TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 16

LEROY GRAHAM, ET AL., PETITIONERS,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1949.
CERTIORARI GRANTED JUNE 27, 1949.

SUPREME COURT OF THE UNITED STATES

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INDEX

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—3475

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 9716

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Appellant,

v.

LEROY GRAHAM, ET AL.,

Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

COMPLAINT FOR INJUNCTION, DAMAGES AND OTHER RELIEF

This action arises under U. S. Code, Title 28, Sections 41(8), 125 and 400, and Title 45, Sections 151 *et seq.*, commonly known as The Railway Labor Act.

For their complaint, plaintiffs allege that:

1: As more fully hereinafter set forth, plaintiffs are Negroes, citizens of the United States, who bring this action on their own behalf and on behalf of others similarly situated, to preserve and enforce their rights to employment on the defendant railroads and certain other Southeastern

carriers against the discriminatory practices of the defendants which have been declared unlawful by the Supreme Court of the United States.

2. The Negro firemen on whose behalf this action is brought are employed by the defendant railroads and carriers owned or controlled by them which are hereinafter designated, and such firemen are many hundred in number and it is therefore impracticable to bring them all before the Court. These are common questions of law and fact affecting the rights of these plaintiffs and those of the other Negro firemen on whose behalf this action is brought.

3. Defendant Southern Railway Company is a corporation operating as a common interstate carrier along the eastern seaboard. It is engaged in, and is doing regular, continuous and substantial business in the District of Columbia. The said Railway Company maintains extensive executive, business and operating offices and numerous employees, solicits passenger and freight business, operates trains and carries on other regular and substantial business activities, all within the District of Columbia.

4. Defendant Seaboard Air Line Railway Company is a corporation operating as a common interstate carrier along the eastern seaboard. It is engaged in and is doing regular, continuous and substantial business in the District of Columbia. The said Railway Company maintains offices and employees within the District for the solicitation and handling of freight and passenger business, for the supply and operation of dining car services on its trains; brings its passenger and freight cars into the District and carries on other regular and substantial business activities, all within the District of Columbia.

5. Defendant Atlantic Coast Line Railroad Company is a corporation operating as a common interstate carrier along the eastern seaboard. It is engaged in and is doing regular, continuous and substantial business in the District of Columbia. The said Railroad Company maintains offices and employees within the District for the solicitation and handling of freight and passenger business, for the supply and operation of dining car services on its trains; brings its passenger and freight cars into the District and carries

on other regular and substantial business activities, all within the District of Columbia.

6. At the times hereinafter mentioned, the defendant railroads and those railroads and terminal companies mentioned in Paragraphs 13, 14 and 15 of this complaint, together with certain other Southeastern Carriers, has designated the members of the Southeastern Carriers' Conference Committee to represent them in their collective bargaining with the defendant Brotherhood of Locomotive Firemen and Enginemen and in negotiating and executing the hereinafter mentioned agreement of February 18, 1941, a copy of which is annexed hereto and marked Exhibit A and made a part of this complaint as if fully set forth herein.

7. Defendant Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as Brotherhood) is a national unincorporated association whose membership consists in chief part of the locomotive firemen and enginemen employed on various railroads engaged in interstate commerce including the defendant railroad companies and the other railroad companies mentioned herein. Brotherhood maintains offices in the District of Columbia at 10 Independence Avenue, S. W., in conjunction with the Railway Labor Executives Association, employs agents and acts as bargaining representative under the Railway Labor Act within the District of Columbia and is otherwise doing business regularly within the District of Columbia.

8. Defendant Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 7, sometimes known as the "Potomac" Lodge, is a subordinate lodge of Brotherhood, composed principally of members of Brotherhood who reside in the District of Columbia, and maintains offices at 523 8th Street, N. E., Washington, D. C.

9. Defendant Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 532, sometimes known as the "National Capitol" Lodge is a subordinate lodge of Brotherhood composed principally of members of Brotherhood who reside in the District of Columbia, and maintains offices at 523 8th Street, N. E., Washington, D. C.

10. Defendant Marven M. McQuade resides in the District of Columbia at 2231 Douglas Street, N. E. and is the

Recording Secretary and Financial Secretary of the defendant Lodge No. 7 and is sued herein as a representative of the members of the defendant Brotherhood and the defendant subordinate Lodges No. 7 and No. 532.

11. Defendant William E. Lacey resides in the District of Columbia at 611 Morris Place, N. E. and is the Recording Secretary of the defendant Lodge No. 532 and is sued herein as a representative of the members of the defendant Brotherhood and the defendant subordinate Lodges No. 7 and No. 532.

12. Upon information and belief, defendants subordinate Lodges No. 7 and No. 532 are all the lodges of defendant Brotherhood within the District of Columbia and are truly and fairly representatives of the other subordinate lodges of Brotherhood and of Brotherhood itself, and the interest of all the members, subordinate lodges and of the Brotherhood will be adequately represented in this action by the defendants. The defendants subordinate Lodges and the defendants McQuade and Lacey are sued as representatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure.

13. The Defendant Southern Railway Company, in addition to the railway lines which it operates directly, owns or controls other railroads and railroad terminals through stock ownership, lease or other arrangements and controls and determines or is in position to control and determine the policies of such other railroads, including their labor policies. The railroads and railroad terminals which the defendant Southern Railway Company so owns or controls are: State University Railroad Company, whose principal office is located in Washington, D. C.; Cincinnati, New Orleans and Texas Pacific Railway Company, whose principal office is located in Cincinnati, Ohio; Alabama Great Southern Railway Company, whose principal office is located in Birmingham, Alabama; Woodstock and Blockton Railway Company, whose principal office is located in Washington, D. C.; New Orleans and Northeastern Railway, whose principal office is located in New Orleans, Louisiana; New Orleans Terminal Company, whose principal office is located

in Washington, D. C.; Georgia Southern and Florida Railway Company, whose principal office is located in Macon, Georgia; St. Johns River Terminal Company, whose principal office is located in Washington, D. C.; Harriman and Northeastern Railway Company, whose principal office is located in Washington, D. C. and Cincinnati; Burnside and Cumberland River Railway Company, whose principal office is located in Washington, D. C.

14. The defendant Atlantic Coast Line Railroad Company, in addition to the railway lines which it operates directly, owns or controls other railroads and railroad terminals through stock ownership, lease or other arrangements and controls and determines or is in a position to control and determine the policies of such other railroads, including their labor policies. The railroads and railroad terminals which the defendant Atlantic Coast Line Railroad Company so owns or controls are Louisville and Nashville Railroad Company, whose principal office is located in Louisville, Kentucky; Atlanta and Westpoint Railroad Company, whose principal office is located in Atlanta, Georgia; Western Railway of Alabama and the Georgia Railroad, whose principal offices are located in Atlanta, Georgia.

15. The defendants Southern Railway Company, Atlantic Coast Line Railroad Company and Seaboard Airline Railway Company jointly own or control the following railroads and railroad terminals through stock ownership, lease or other arrangements and they jointly control and determine or are in a position jointly to control and determine the policies of those railroads and railroad terminals including their labor policies: Atlanta Terminal Company, whose principal office is located in Atlanta, Georgia; Norfolk and Portsmouth Beltline Railroad Company, whose principal office is located in Norfolk, Virginia; and the Jacksonville Terminal Company, whose principal office is located in Jacksonville, Florida.

16. Defendant Brotherhood by virtue of its constitution and by its practice restricts its membership to white locomotive firemen and enginemen and excludes Negro firemen from membership solely because they are Negroes.

17. Defendant Brotherhood members at all times herein mentioned constituted the majority of the craft or class of locomotive firemen on most of the interstate railroads of the United States including the defendant carriers and other railroads and terminal companies mentioned herein which are owned or controlled by them, and the defendant Brotherhood under and by virtue of the Railway Labor Act has acted as the sole bargaining agent and representative of the entire class or craft of locomotive firemen, including plaintiffs and others similarly situated. As such agent Brotherhood negotiated agreements with the defendant railroads and the other railroads and terminal companies herein mentioned as to rates of pay, rules and conditions of employment for all members of the said class or craft, including the agreement with the defendant railroads and the other Southeastern Carriers dated February 18, 1941, which is Exhibit A to this complaint.

18. For some years prior to the date of the execution of the aforesaid agreement, defendant railroads and the other Southeastern Carriers unlawfully conspired with defendant Brotherhood to advance the interests of the members of the Brotherhood and to eliminate Negro locomotive firemen from their lawful employment and to deprive them of their rights and property as herein alleged, and in furtherance of said conspiracy did enter into the aforesaid agreement of February 18, 1941 and into other unlawful and secret agreements and arrangements, written and oral, to accomplish the said unlawful purposes.

19. At the times herein mentioned, defendant Brotherhood in assuming the obligation to act and in acting as sole bargaining agent and representative under the Railway Labor Act did not fairly and equitably bargain or act for or on behalf of all members of the class or craft of locomotive firemen involved in negotiations between the Brotherhood and defendant railroads and the other railroads and terminal companies herein mentioned (sometimes hereinafter referred to as "Southeastern Carriers"); in so dealing with such railroads, the Brotherhood did not perform and failed to discharge its lawful duty, obligation and trust to protect equally the interests of all members of the craft.

Instead and in violation of the law, Brotherhood acted exclusively for the benefit and in the interest of its own membership and discriminated against these plaintiffs and other Negro locomotive firemen and deprived them of their right to work on fair and equal terms with white locomotive firemen and with members of the Brotherhood; and to that end defendant Brotherhood negotiated and consummated with the defendant railroads, and the other Southeastern Carriers a number of agreements, including the agreement of February 18, 1941, which is Exhibit A to this complaint, and which is sometimes known and herein referred to as the "Southeastern Carriers Agreement" or the "Washington Agreement."

20. The agreement of February 18, 1941, which is Exhibit A to the complaint, was executed in Washington, D. C. and on the same day became a Mediation Agreement in settlement of differences between the Brotherhood and the defendant railroads and the other Southeastern Carriers, consummated under the purported authority of the National Mediation Board and witnessed by two of the members of the said board. The Mediation Agreement was likewise executed in Washington, D. C. A copy of the said Mediation Agreement is annexed hereto, marked Exhibit B and made a part hereof as if fully set forth herein.

21. Under the provisions of the Washington Agreement the defendant Brotherhood reserved the right to press for further discriminatory restrictions upon the employment of Negro firemen by the carriers which were parties thereto. Pursuant to that provision the defendant Brotherhood and the Louisville and Nashville Railroad Company entered into a supplemental agreement on May 12, 1941 which further curtailed the seniority rights of Negro firemen and further limited their employment. Upon information and belief since February 18, 1941 the defendant Brotherhood and various of the Southeastern carriers entered into supplemental agreements, sometimes in writing and sometimes oral, and engaged in practices which extended the unlawful discriminatory employment provisions of the Washington Agreement.

22. The said agreements were intended to by the defendants and the other Southeastern Carriers and did operate to the serious injury of the plaintiffs and others similarly situated as herein more fully set forth.

23. Employment as locomotive firemen by defendant railroads and the other Southeastern Carriers and the seniority rights which attach to such employment are property rights of great importance to the firemen so employed, including the individual plaintiffs, and such employment constitutes plaintiffs' sole means of livelihood.

24. The agreement of February 18, 1941 makes provision for the terms of employment, including the rights of seniority, of "promotable" firemen and "non-promotable" firemen. The term "promotable firemen" refers to white firemen and Negro firemen are those referred to by the term "non-promotable firemen." The term "promotable" means eligible for promotion to the position of locomotive engineer. Negro firemen are by the practices and agreements of all defendants made ineligible for promotion to positions as locomotive engineers. Because these plaintiffs and other Negro firemen are "non-promotable," many have served for long periods as firemen on the lines of the defendant railroads and the other Southeastern Carriers and the seniority which they have thus acquired entitles them to obtain, and in the past and before the acts complained of herein, has enabled many to obtain some of the better paid, desirable runs on the defendant railroads and those of the other Southeastern Carriers herein mentioned.

25. The defendant railroads and the other railroads and terminals herein mentioned have, at all times herein referred to, established senority divisions in which locomotive firemen have preference rights to job assignments carrying more favored rates of pay, bonuses and working conditions which, but for the actions of the defendants complained of, would be based upon the length of service of the locomotive firemen in each division. Because of the unlawful agreements among the defendant railroads, the other Southeastern Carriers and the defendant Brotherhood, such seniority preference rights have been denied to the plaintiffs herein and to other Negro firemen employed by such roads.

26. The replacement of hand-fired steam locomotives on the railway lines of the defendant railroads and the other railroads and terminals herein mentioned by mechanical stokers, Diesel locomotives and other non-steam power has, under the terms of the said unlawful agreements and as a result of the aforesaid conspiracy led to the widespread and unlawful displacement of plaintiffs and other Negro firemen by white firemen having less seniority in service and the plaintiffs and other Negro firemen have been thereby damaged by loss of positions, wages and other lawful benefits to which plaintiffs and other Negro firemen would otherwise have been entitled, including benefits under the Railroad Retirement Act of 1937 (U. S. Code Title 45, Section 228 et seq.).

27. Plaintiff Leroy Graham is a Negro and a citizen of the United States residing in Tampa, Florida with seniority in employment as a fireman by defendant Seaboard Air Line Railway Company since November 8, 1924. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Leroy Graham was wrongfully displaced by defendant Seaboard Air Line Railway Company in his position as fireman on or about July 27, 1941, and his place was given to a white fireman with less seniority on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

28. Plaintiff Joseph Munlin is a Negro and a citizen of the United States residing in Miami, Florida with seniority in employment as a fireman by defendant Seaboard Air Line Railway Company since January 5, 1924. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Joseph Munlin was wrongfully displaced by defendant Seaboard Air Line Railway in his position as fireman in April, 1942, and his place was given to a white fireman with only three or four months seniority on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

29. Plaintiff John W. Warran is a Negro and a citizen of the United States residing in Savannah, Georgia with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since July, 1912. In pursuance of the unlawful conspiracy, agreements and practices herein

referred to, plaintiff John W. Warran was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman in July, 1941 and his place was given to a white fireman with less seniority on a Diesel locomotive in violation of plaintiff's rights and to his injury and damage.

30. Plaintiff Ed Sullivan is a Negro and a citizen of the United States residing in Jacksonville, Florida with seniority in employment as a fireman by defendant Seaboard Air Line Railway Company since April 1, 1913. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Ed Sullivan was wrongfully displaced by defendant Seaboard Air Line Railway Company in his position as fireman in April, 1939 and his place was given to a junior white fireman with at least ten years less service on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

31. Plaintiff Robert Murray is a Negro and a citizen of the United States residing in Savannah, Georgia with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since February, 1913. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Robert Murray was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman and his place was given to a white fireman with less seniority on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

32. Plaintiff William Pratt is a Negro and a citizen of the United States residing in Baldwin, Florida with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since February, 1919. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff William Pratt was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman in January, 1941 and his place was given to a junior white fireman with less seniority in violation of plaintiff's rights and to his injury and damage.

33. Plaintiff Luther Thomas is a Negro and a citizen of the United States residing in Rocky Mount, North Carolina with seniority in employment as a fireman by defendant At-

lantic Coast Line Railway Company since February, 1918. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Luther Thomas was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman in May, 1941, and his place was given to a junior white fireman with less seniority in violation of plaintiff's rights and to his injury and damage.

34. Plaintiff Sam Hogan is a Negro and a citizen of the United States residing in Tampa, Florida with seniority in employment as a fireman by defendant Seaboard Air Line Railway Company since 1919. Plaintiff Sam Hogan was displaced in his position as fireman on a steam locomotive in the year 1938, and again in May, 1941, by reason of the institution of Diesel engine locomotives, on both occasions by junior white firemen in violation of plaintiff's rights and to his injury and damage.

35. Plaintiff Ernest Duckett is a Negro and a citizen of the United States residing in Tampa, Florida with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since about February, 1920. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Ernest Duckett was wrongfully displaced by defendant Atlantic Coast Line Railway Company in July, 1941, and his place was given to a junior white fireman with less seniority in violation of plaintiff's rights and to his injury and damage.

36. Plaintiff Spencer Hicks is a Negro and a citizen of the United States residing in Richmond, Virginia with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since February 20, 1924. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Spencer Hicks was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman on or about June 26, 1947, and his place was given to a white fireman with less seniority on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

37. Plaintiff Moses Maxwell is a Negro and a citizen of the United States residing in Charleston, South Carolina with seniority in employment as a fireman by defendant

Atlantic Coast Line Railway Company since 1924. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Moses Maxwell was wrongfully displaced by defendant Atlantic Coast Line Railway Company from his employment as a fireman and placed in a less desirable night-time job paying much less, and his place was given to a white fireman with only five years of service on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

38. Plaintiff A. A. Fields is a Negro and a citizen of the United States residing in Sanford, Florida with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since 1907. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff A. A. Fields was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman in October, 1946, and his place was given to a white fireman with seniority only since 1940 on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

39. Plaintiff Edward Jackson is a Negro and a citizen of the United States residing in Meridian, Mississippi, with seniority in employment as a fireman by the New Orleans and Northeastern Railway Company since 1924. In pursuance of the unlawful conspiracy, agreements and practices herein referred to plaintiff Edward Jackson was wrongfully displaced by the said New Orleans and Northeastern Railway Company from his position as fireman. His applications for position as fireman on Diesel locomotives to which he was entitled by virtue of his seniority were rejected on several occasions since about 1941, and these positions were given to white firemen with less seniority in violation of plaintiff's rights and to his injury and damage.

40. Plaintiff C. B. Battle is a Negro and a citizen of the United States residing in Richmond, Virginia with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since August 29, 1917. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff C. B. Battle was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman on or about June 26, 1947, and his place

was given to a white fireman with less seniority on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

41. Plaintiff M. C. Davis is a Negro and a citizen of the United States residing in Richmond, Virginia with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since December 14, 1916. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff M. C. Davis was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman on or about September 10, 1947, and his place was given to a white fireman with less seniority on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

42. Plaintiff Lonnie Gorham is a Negro and a citizen of the United States residing in Richmond, Virginia with seniority in employment as a fireman by defendant Atlantic Coast Line Railway Company since December 9, 1922. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, plaintiff Lonnie Gorham was wrongfully displaced by defendant Atlantic Coast Line Railway Company in his position as fireman on or about June 26, 1947, and his place was given to a white fireman with less seniority on a Diesel engine locomotive in violation of plaintiff's rights and to his injury and damage.

43. The plaintiffs John Cotton, James Johnson, Walter Thomas, Thomas Edwards, Sr. and George W. Zimmerman are all Negroes, citizens of the United States and residing in Rocky Mount, North Carolina. In pursuance of the unlawful conspiracy, agreements and practices herein referred to, these plaintiffs were wrongfully displaced by defendant Atlantic Coast Line Railway Company in their positions as firemen, and their places were given to white firemen with less seniority on Diesel engine locomotives in violation of their rights and to their injury and damage.

44. Other Negro firemen employed by each of the defendant railroads and the other carriers mentioned herein have been displaced in their positions as firemen and either discharged from employment or demoted to less desirable jobs, and their positions given to white firemen with much less seniority, in violation of their rights and to their in-

jury and damage. Unless enjoined the defendants and the carriers owned or controlled by them will continue unlawfully to displace and demote Negro firemen.

45. But for the conspiracy and the unlawful practices and agreements of the Brotherhood, defendant railroads and the other Southeastern Carriers, plaintiffs would have been continued in their employment as firemen and would have enjoyed the benefits of seniority and tenure in their respective positions; however, as a result of the said unlawful conspiracy, practices and agreements plaintiffs and other Negro firemen have been deprived of their employment and have been denied such benefits and their property and seniority rights and their tenure of employment have been destroyed, in violation of the Railway Labor Act and the Constitution of the United States.

46. In 1944 the Supreme Court of the United States adjudged the Washington Agreement, the supplemental agreement above referred to, and the practices thereunder to be illegal and violative of the Railway Labor Act. Notwithstanding this determination by the Supreme Court the defendants and the other Southeastern carriers have failed to discontinue their unlawful agreements and practices but have continued to discriminate against plaintiffs and other Negro firemen similarly situated in plain violation of the law and the decisions of the highest court of the land.

47. The unlawful practices and agreements of the defendants complained of herein are continuing and are causing injury and damage to plaintiffs and other Negro firemen similarly situated on whose behalf this action is brought, and plaintiffs and such other Negro firemen are still being excluded from positions as firemen on the aforesaid railroads to which they are rightfully entitled, and they are being denied seniority and other rights which are lawfully theirs. The continued exclusion of plaintiffs and other Negro firemen from their proper positions upon which they depend for their livelihood and the continued denial to them of their seniority and other rights aggravate and increase their damage and injury with the passage of time and unless this court grants the relief prayed for, plaintiffs will be irreparably damaged.

48. Plaintiffs have no adequate remedy at law.

Wherefore plaintiffs pray that:

a. This court take jurisdiction and determine the rights of the parties and enter judgment declaring the said agreement of February 18, 1941 and other similar agreements among the same parties and the practices thereunder to be invalid and unenforceable as collective bargaining agreements regulating and controlling the employment of firemen on the railroads which are parties to the said agreements with the Brotherhood; declaring that the said agreements are null and void insofar as they deprive plaintiffs and other Negro firemen of seniority and employment rights and declaring that plaintiffs have been illegally removed from their positions and should be restored to such jobs and assigned to such runs as their seniority rights would entitle them to but for the said unlawful agreements and the practices thereunder.

b. This court issue a permanent injunction enjoining defendants, their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them from recognizing or enforcing or complying with the said agreement of February 18, 1941 and any other agreements or understandings which in terms or application countenance or enforce similar unlawful and discriminatory practices against plaintiffs and other Negro firemen similarly situated or from taking any action which would have similar discriminatory or unlawful effect as would the enforcement of such agreements or practices.

c. The permanent injunction issued against the defendant railroads should order and direct the defendant railroads, their officers and agents to take immediate and effective action to cause the other railroads and terminal companies herein mentioned which are owned or controlled by them to cease and desist from recognizing or enforcing or complying with the said agreement of February 18, 1941 or other agreements or understandings to which they may be parties which in terms or application countenance or enforce similar unlawful and discriminatory practices against plaintiffs and other Negro firemen similarly situated or from taking any action which would have similar discrimi-

natory or unlawful effect as would the enforcement of such agreements or practices.

d. This court enter judgment ordering defendants to restore plaintiffs and other Negro firemen similarly situated to their positions from which they were wrongfully and unlawfully displaced and that their seniority and other employment rights be reinstated.

e. This court issue a permanent injunction against defendant Brotherhood, its officers, agents, servants, employees, attorneys and subordinate lodges and all persons in active concert or participation with them enjoining them from purporting to act as plaintiffs' representative or as the representative of the class or craft of locomotive firemen under the Railway Labor Act so long as defendant Brotherhood and its subordinate lodges and their officers and agents shall not represent or act fairly on behalf of all locomotive firemen including these plaintiffs and other Negro firemen or shall discriminate against them in matters relating to wages, seniority, tenure or other conditions of employment.

f. Plaintiffs recover judgment against defendants for damages for their loss of employment and wages by reason of the said unlawful practices and agreements of the defendants.

g. That pending the final hearing and determination of the action, this court issue a preliminary injunction against the defendants enjoining and restraining them from continuing the unlawful acts and practices complained of.

h. That the plaintiffs may have such other, further and different relief as to the court may seem proper, together with the costs and disbursements of this action.

EXHIBIT A

Agreement

between

THE SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE

representing the

Atlantic Coast Line Railway Company
Atlanta and West Point Railroad Company and Western Railway of Alabama
Atlanta Joint Terminals
Central of Georgia Railway Company
Georgia Railroad
Jacksonville Terminal Company
Louisville and Nashville Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern Railroad Company
St. Louis-San Francisco Railway Company
Seaboard Air Line Railway Company
Southern Railway Company (including State University Railroad Company and Northern Alabama Railway Company)
The Cincinnati, New Orleans and Texas Pacific Railway Company
The Alabama Great Southern Railroad Company (including Woodstock and Blocton Railway Company and Belt Railway Company of Chattanooga)
New Orleans and Northeastern Railroad Company
St. Johns River Terminal Company
New Orleans Terminal Company
Georgia Southern and Florida Railway Company
Harriman and Northeastern Railroad Company
Cincinnati, Burnside and Cumberland River Railway Company
Tennessee Central Railway Company

and the

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS

(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service estab-

lished as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2)(a) and (2)(b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required, in addition to showing, in the opinion of management, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extend over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

All promotable firemen now in the service who are physically qualified, who have not heretofore been called for examination for promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examination for promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Carriers:

SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE
(S.) C. D. MACKAY
Chairman

C. D. MACKAY
H. A. BENTON
S. S. SLOCUM
H. L. WOUMAN
Per C. P. KING
Committee Members

For the Employees:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS
(S.) D. B. ROBERTSON
President

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN'S COMMITTEE
(S.) A. G. METCALFE
Chairman

EXHIBIT B

National Mediation Board

Washington

Mediation Agreement

George A. Cook, Chairman
Otto S. Beyer
David J. Lewis,

Robert F. Cole, Secretary

Mediation Agreement

In settlement of differences as set forth in an application for Mediation dated January 15, 1941, and described in National Mediation Board Docket Case No. A-905, and under the provisions of the Railway Labor Act, it is mutually agreed that the proposals submitted by the General Grievance Committees of the Brotherhood of Locomotive Firemen and Enginemen, namely:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen or helpers on other than steam power are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

to the following carriers:

Atlantic Coast Line Railway Company
Atlanta and West Point Railroad Company and Western Railway of Alabama
Atlanta Joint Terminals
Central of Georgia Railway Company

Georgia Railroad
Jacksonville Terminal Company
Louisville and Nashville Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern Railroad Company
St. Louis-San Francisco Railway Company
Seaboard Air Line Railway Company
Southern Railway Company (including State University Railroad Company and Northern Alabama Railway Company)
The Cincinnati, New Orleans and Texas Pacific Railway Company
The Alabama Great Southern Railroad Company (including Woodstock and Blocton Railway Company and Belt Railway Company of Chattanooga)
New Orleans and Northeastern Railroad Company
New Orleans Terminal Company
Georgia Southern and Florida Railway Company
St. Johns River Terminal Company
Harriman and Northeastern Railroad Company
Cincinnati, Burnside and Cumberland River Railway Company
Tennessee Central Railway Company

which carriers, for the purpose of this mediation, were represented by the Southeastern Carriers' Conference Committee, is disposed of by the agreement of the parties attached hereto, effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Carriers:

SOUTHEASTERN CARRIERS CONFERENCE COMMITTEE
(S.) C. D. MACKAY
Chairman

C. D. MACKAY
H. A. BENTON
S. S. SLOCUM
H. L. WOUMAN
Per C. P. KING

For the Employees:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEERS
(S.) D. B. ROBERTSON
President

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN'S COMMITTEE
(S.) A. G. METCALFE
Chairman

Witnessed:

(S.) GEORGE A. COOK
Chairman, National Mediation Board
(S.) OTTO S. BEYER
Member, National Mediation Board

Motion for Preliminary Injunction

Plaintiffs move the Court for a preliminary injunction.

(a) Enjoining the defendants, their officers, agents, servants, employees and attorneys and all persons in active concert or participation with them from recognizing or enforcing or complying with the agreement of February 18, 1941, which is Exhibit "A" to the complaint herein and any other agreements or understandings which in terms or application, countenance or enforce similar discriminatory practices against the plaintiffs and other Negro firemen similarly situated, or from taking any action which would have similar discriminatory or unlawful effect as would the enforcement of such agreements or practices,

(b) Ordering and directing the defendant railroads, their officers and agents to take immediate and effective action to cause the other railroads and terminal companies mentioned in Paragraphs 13, 14 and 15 of the complaint and which are owned or controlled by the defendant railroads to cease and desist from recognizing or enforcing the said agreement of February 18, 1941, or other agreements or understandings to which they may be parties which in terms or application, countenance or enforce similar unlawful or discriminatory practices against plaintiffs and other Negro firemen similarly situated or from taking any action which would have similar discriminatory or unlawful effect as would the enforcement of such agreements or practices,

(c) Enjoining the defendant Brotherhood, its officers, agents, servants, employees, attorneys and subordinate lodges and all persons in active concert or participation with them from purporting to act as plaintiffs' representative or as the representative of the class or craft of locomotive firemen under the Railway Labor Act so long as defendant Brotherhood and its subordinate lodges shall

not represent or act fairly on behalf of all locomotive firemen, including these plaintiffs and other Negro firemen, or shall discriminate against these plaintiffs or other Negro firemen in matters relating to wages, seniority, tenure or other conditions of employment; on the grounds that:

1. The agreement of February 18, 1941, and the other acts complained of in the complaint filed in this action have been adjudicated by the Supreme Court of the United States to be unlawful under the Constitution and laws of the United States and particularly under the Railway Labor Act;

2. Notwithstanding such adjudication by the Supreme Court of the United States, the defendants have continued and, unless restrained, will continue their unlawful discriminatory practices and agreements against these plaintiffs and other Negro firemen similarly situated;

3. Such action by the defendants will result in the loss of jobs, seniority and other valuable property rights to the plaintiffs and will result in irreparable injury to them, as more particularly appears in the complaint and affidavit of Ben J. McLaurin, annexed hereto;

4. The issuance of a preliminary injunction herein will merely restrain the defendants from continuing unlawful conduct, and is necessary to prevent irreparable injury to the plaintiffs pending the final hearing and determination of this action.

Affidavit in Support of Motion for a Preliminary Injunction

DISTRICT OF COLUMBIA,
City of Washington, ss:

BENJAMIN F. McLAURIN, being duly sworn, deposes and says:

1. I am the International Field Organizer of the Brotherhood of Sleeping Car Porters, an international union affiliated with The American Federation of Labor. The Brotherhood is the bargaining agent and representative under the Railway Labor Act for railroad train, chair car, coach porters and attendants many of whom are Negroes.

2. As a result of repeated appeals of delegations of Negro firemen for assistance, the Brotherhood of Sleeping Car Porters has interested itself in the efforts of Negro firemen to secure their rights under the Constitution and laws of the United States and redress for the injury which they have suffered in the past because of the unlawful acts of the defendants and the other railroads and terminal companies mentioned in the complaint.

3. Accordingly, with the aid of the Brotherhood of Sleeping Car Porters, there was organized on March 28, 1941 a Provisional Committee to Organize Colored Locomotive Firemen, of which I am the Field Organizer. A great many Negro firemen have joined the said Committee, so that today the membership of the Committee comprises the greater portion of all the Negro firemen on the railway lines of the United States as well as the greater portion of all Negro firemen on the railroads involved in this action.

4. The plaintiffs in this action and the other Negro firemen in whose behalf this suit has been brought are men of little means who are not financially or otherwise able to take necessary action to secure their rights under the law. This is especially true because the acts complained of have deprived these plaintiffs of the jobs or seniority rights upon which they depend for their livelihood.

5. In furtherance of the purpose of the Brotherhood of Sleeping Car Porters to assist these plaintiffs and other Negro firemen who have been displaced or demoted because of the unlawful acts of the defendants, and as Filed Organizer of the said Provisional Committee, I have been in close and active contact with these firemen and am fully familiar with the facts and practices complained of and with the events out of which this action arose. I have read the Complaint in this action and believe the allegations to be true.

6. The defendant Brotherhood of Locomotive Firemen and Enginemen represents all locomotive fireman employed by the defendant railroads and the other Southeastern railroads and terminal companies mentioned in the complaint for purposes of collective bargaining under the Railway Labor Act, having been selected as bargaining agent by the majority of the craft. The defendant Brother-

hood has been such an agent for many years including the entire period mentioned in the complaint in this action. Negro firemen who constitute a minority of the craft are not admitted to membership in the defendant Brotherhood but nonetheless they must accept it as their bargaining representative. Negro firemen are not admitted to membership in the defendant Brotherhood solely because they are Negroes.

7. Matters of great importance to locomotive firemen in the realm of collective bargaining are seniority rights and the right to promotion to the more highly paid position of locomotive engineer. Upon the seniority of the fireman depends the right to the more desirable runs on the railroads, and upon the right of promotion depends the possibility of the fireman advancing to the position of engineer.

8. Railroads do not employ Negroes as locomotive engineers and accordingly, the defendant railroads and the defendant Brotherhood have always regarded and designated Negro firemen as "non-promotable" men. Other firemen if they possess the requisite qualifications are eligible for promotion to engineers. Because Negro firemen are "non-promotable" these plaintiffs and other Negroes have served for long periods as firemen on the lines of the defendant railroads and other Southeastern Carriers and the seniority which they have thus acquired entitles them to obtain and in the past, and before the acts complained of, has enabled many to obtain some of the better paid and more desirable runs on the railroads for which they work.

9. Starting some years before 1941 the defendant Brotherhood initiated its practice of seeking arrangements or agreements with the railroads involved in this action to have them hire white promotable firemen in greater numbers than had theretofor been the case and to discriminate in new hirings against Negroes. Various arrangements in the form of secret understandings, "gentlemen's agreements" and other forms of agreements were made between the defendant Brotherhood and the Southeastern Carriers extending the discrimination against the employment of Negro firemen and of disregarding the seniority rights which they had built up during long periods of service. Attached hereto and marked Exhibit A is a

copy of a communication signed by one Thad S. Lee and approved by R. J. Tillery, a Vice President of the defendant Brotherhood, which evidences in part the nature of the agreements and the manner in which they were consummated.

10. In March of 1940, the defendant Brotherhood demanded of the railroads herein involved and other Southeastern Carriers that existing working agreements and practices be modified and that the discrimination against Negro firemen be further extended in such a way as would drive Negro firemen completely out of service with the carriers. In making this demand the defendant Brotherhood purported to act as representative of the entire craft of firemen under the Railway Labor Act. On February 18, 1941, the railroads entered into a written agreement with the defendant Brotherhood as the exclusive representative of the craft, which provided that *not more* than 50 per cent of the firemen in each class of service in each seniority district should be Negroes, and that until the percentage of white firemen in each district reached 50 per cent, all new runs and all vacancies should be filled by white men and that Negroes should not be permitted employment in any seniority district in which they were not then working. This agreement was executed in Washington, D. C. by the defendant Brotherhood and by the defendant railroads and the other Southeastern Carriers, acting through the Southeastern Carriers' Conference Committee.

11. This Washington agreement reserved the right of the defendant Brotherhood to press for further restrictions on the employment of Negro firemen on the lines of the individual carriers including the defendant railroads and the other railroads and terminal companies mentioned in the complaint. In furtherance of this provision, on May 12, 1941, the defendant Brotherhood negotiated a supplemental agreement with The Louisville and Nashville Railroad Company which further curtailed the seniority rights of Negro firemen and further restricted their employment. I am informed and believe that from time to time since February 18, 1941, the defendant Brotherhood has made various supplemental arrangements with others of the defendant railroads and railroads and terminal

companies mentioned in the complaint, which extended the unlawful restrictions and discriminations of the February 18, 1941, agreement. These arrangements were not made public and they were, upon information and belief, sometimes in writing and sometimes in the form of secret understandings and "gentlemen's agreements". The effect of such agreements and practices was to restrict the percentage of Negro firemen considerably below the 50% limit set by the Washington Agreement and in some cases the effect has been to eliminate Negro firemen from the service completely.

12. In recent years steam power has been displaced in ever increasing volume by Diesel locomotives and other forms of non-steam power on the lines of the defendant railroads and the other railroads and terminal companies mentioned in the complaint. Some of the most desirable runs and the best paid jobs have become those of firemen on trains propelled by other forms of power than steam power. By the terms of the Washington Agreement, the defendants and the other carriers which were parties to the agreement undertook to employ only promotable men (i.e., white men) to positions as locomotive firemen or helpers on such trains. As a result, the carriers and the defendant Brotherhood have arranged to staff and are staffing trains with junior "promotable" men notwithstanding that they lack the experience of the senior Negro firemen.

13. All of these agreements and arrangements were made by the defendant Brotherhood with the carriers without giving to these plaintiffs or to any of the Negro firemen any notice or opportunity to be heard with respect to their provisions and in fact there was no disclosure to the Negro firemen affected of the existence of these agreements and arrangements until they were put into effect and were operating to the detriment of the Negro firemen.

14. As a result of these agreements and arrangements, the defendant Brotherhood, purporting to act as representative of the entire class of firemen of the railroads, caused the plaintiffs to lose their jobs or to be demoted to less desirable runs and more poorly paid jobs regardless of seniority, fitness and ability. Such of these plaintiffs and other Negro firemen who were not discharged outright

from their employment with the carriers, were assigned to more arduous and difficult jobs with longer hours and with less pay. The railroads have refused to restore plaintiffs and other Negro firemen to their prior positions and to give them the rights to which their seniority entitled them, and the defendant Brotherhood refused, although it was acting as representative of the class, to take any action to have the plaintiffs and other Negro firemen restored to the positions to which they were entitled.

15. In an effort to have these unlawful agreements and practices between defendants and the other named carriers corrected and to prevent the rapid elimination of Negro firemen from the railroads of this country, complaints were made to the President's Committee on Fair Employment Practices, which after notice to the defendant Brotherhood and the other parties to the February, 1941, agreement, held public hearings in Washington, D. C., on September 15-18, 1943. The defendant Brotherhood filed no answer to any of the charges and otherwise ignored the proceedings, and the carriers admitted that they were parties to the Washington Agreement and that by virtue of its provisions the employment of Negroes as firemen on their lines was being restricted. On November 18, 1943, the said Committee issued its "Summary, Findings and Directives." The Committee found that the agreement of February 18, 1941, discriminated against Negro firemen and restricted their employment opportunities; and that the said agreement was in conflict with and in violation of Executive Order 9346, issued May 27th, 1943. The Committee directed the carriers and the defendant Brotherhood immediately to cease and desist from their discriminatory practices affecting the employment of Negroes and directed the carriers and defendant Brotherhood to set aside the February 18, 1941 agreement and ordered the carriers to adjust their employment policies and practices so that all needed workers would be hired and all employees promoted or upgraded without regard to race, creed, color or national origin. The defendant Brotherhood was directed to cease its discriminatory practices while acting as bargaining agent for the craft of firemen, and to cease all practices which deprived Negro firemen of the same opportunities afforded white

firemen in choosing and conferring with bargaining representatives in respect to the adjustment of grievances and in the negotiation of any agreements with the Southeastern Carriers concerning hiring, tenure, promotion or other conditions of employment.

16. Neither the defendant Brotherhood nor any of its subordinate lodges nor any of the carriers who were parties to the Washington Agreement has obeyed or complied with any of the directives of the President's Committee and has continued without letup the discriminatory practices called for by the Washington Agreement and the other agreements between the defendant Brotherhood and the Southeastern Carriers.

17. Some time in 1942, several of the Negro firemen who had been employed by some of the carriers who were parties to the Washington Agreement instituted actions in the State and Federal Courts to enjoin enforcement of the Washington Agreement and the supplemental agreement of May 12, 1941 which discriminated against them, and for damages against the defendant Brotherhood and such railroads for loss of wages and the impairment of other property rights which they had suffered by virtue of such discriminatory practices. Two of these actions entitled *Steele v. Louisville and Nashville Railroad Company et al.*, and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, et al.*, reached the Supreme Court of the United States in 1944. In unanimous opinions of the Court rendered by the Chief Justice of the United States (323 U. S. 192; 323 U. S. 210) the Washington Agreement of February 18, 1941, the supplemental agreements and the practices of the Brotherhood and railroads thereunder were held illegal and violative of the provisions of the Railway Labor Act. The Supreme Court decided that the defendant Brotherhood, which as bargaining agent under the Railway Labor Act represents all firemen, should be enjoined from continuing its discriminatory arrangements and practices with the carriers and should be prevented from having its white members take the benefit of such discriminatory action. The Court held that the railroads could not lawfully carry out such discriminatory contracts with the bargaining representative for the

firemen which the bargaining representative was prohibited by the statute from making.

18. These decisions of the Supreme Court were rendered on December 18, 1944, but, notwithstanding the clear declaration by the highest Court of the land that the agreements and the practices thereunder were unlawful under the Constitution and laws of the United States, the defendants and the other Southeastern Carriers have ignored these decisions and have continued and are continuing to carry out the provisions of the said unlawful agreements.

19. The displacement of steam power by Diesel locomotives on American railroads and on the roads of the Southeastern Carriers has increased rapidly with the result that, because of the provisions of the agreements and the practices complained of, Negro firemen are being displaced or demoted unlawfully at an ever increasing rate. Unless the laws of the United States are obeyed and these practices enjoined, the complete elimination of Negroes from their time honored jobs as locomotive firemen in the near future is inevitable.

20. The Negro fireman's job and seniority rights are matters of economic life or death to him. Those discharged and those deprived of their seniority rights as firemen by the Southeastern Carriers Agreement are deprived not only of their jobs but also of the opportunity to practice the skills which they have developed through a lifetime of work. They cannot now develop new skills; other suitable jobs are not available to them. The result of the agreements and practices alleged in the complaint has therefore meant tragic ruin to these Negro firemen who have felt the impact of the defendants' unlawful conduct, and will have similar tragic consequences to the other Negro firemen unless the defendants are enjoined.

21. In all Court actions heretofore brought to enjoin the unlawful practices here complained of, the defendants have entered dilatory pleas and motions and have resisted all efforts to bring the issues to early determination. It is to be anticipated that similar moves will be made in this action. The passage of time necessary before there can be a final hearing and determination in this action will bring about the displacement or demotion of many of these plaintiffs

and ultimate judgment in their favor will be a hollow victory. Such displaced firemen have no financial means of their own to support themselves and their families during the long period which would elapse between the date of their discharge and the ultimate judgment in this case. The decisions of the Supreme Court on the very agreements and practices here complained of leave no question that these plaintiffs will ultimately prevail and that the acts sought to be enjoined violate the Constitution and laws of the United States. Unless the enforcement of the said agreements and the practices thereunder are enjoined pending the final hearing in this action, irreparable injury and loss of the means of livelihood will be suffered by many of the plaintiffs and other Negro firemen similarly situated.

22. Moreover, the preservation of the *status quo* by a preliminary injunction will not cause any damage to the defendant carriers since it will merely enjoin them from carrying out agreements with the defendant Brotherhood which deprive them of firemen of long tenure and experience and requires them to accept instead junior white employees of much more limited skill and experience.

Brotherhood of Locomotive Firemen and Enginemen

December 11, 1942.

To Officers and Members of the Brotherhood of Locomotive Firemen and Enginemen, and Other Employees of the Classes Represented by That Organization on the Atlantic Coast Line Railroad and Charleston and Western Carolina Railway.

SIRS AND BROTHERS:

There was no agreement governing wages and working conditions of locomotive firemen, hostlers, and hostler helpers on the Atlantic Coast Line Railroad until 1919, at which time the B. of L. F. & E. secured representation and negotiated an agreement. Only about 20 per cent of the firemen were of a promotable character at that time and as a result the company had great difficulty in maintaining enough engineers to take care of its business.

Through the efforts of the B. of L. F. & E. understandings were reached from time to time with the management to the

effect that promotable men would be hired in greater numbers.

In 1925, former General Chairman, R. L. Glenn, reached a gentlemen's agreement with the management that only promotable men would be hired. White men then and now are classed by the management as promotable and Negroes were then and are now classed by the management as non-promotable.

There were a few violations of this gentlemen's agreement between 1925 and 1927, all of which were duly protested and in most cases corrections were made. However, since 1927, the agreement has been religiously observed and only promotable firemen were hired until the latter part of 1942.

In 1927, the general grievance committee was successful in negotiating an agreement with the management providing that one-third of all assignments would be filled by white men, who, as heretofore stated, are considered promotable by the management. Promotable firemen are required to undergo very strict examinations, promotable firemen are dismissed from the service. Many have been dismissed in the past and no doubt many will be dismissed in the future for failure to pass the examinations. Non-promotable men never become engineers but continue on as firemen, filling the places where promotable men must get their training.

In 1929, the general grievance committee succeeded in revising the agreement to provide that all assignment would be made on a rate of 50—50 as between white and colored firemen—white firemen being promotable and colored firemen being non-promotable.

Early in November, 1942, General Chairman Lee learned, through rumor, that non-promotable men were being hired as locomotive firemen. He wired General Manager Sibley as follows:

November 3, 1942.

"Mr. C. C. Sibley, General Manager, Atlantic Coast Line Railroad Company, Wilmington, N. C.

I have information from my local representatives at several terminals to the effect that local supervisors

advised them that they had authority to employ non-promotable firemen. Trust this information is erroneous. Please advise if such authority has been granted and if management contemplates employing non-promotable firemen. Local committees will be glad to cooperate and furnish sufficient promotable applicants if called upon by local supervisors.

(Signed) THAD S. LEE."

The General Manager made no answer to this telegram. On January 17th, General Chairman Lee again wired General Manager Sibley and asked that he name a date for conference with the Executive Committee. November 23rd was named and conference held on that date. Mr. Sibley tried to evade the issue by denying that any instructions had been issued to the employing officers to hire non-promotable men notwithstanding members of the Executive Committee made it clear that they had been informed by some of the employing officers that they had such instructions.

November 24th the Executive Committee again met the General Manager at which time Vice-President Tillery of the Brotherhood was present. This conference bore no more fruit than the one on the 23rd. The gentlemen's agreement was called to the General Manager's attention on a number of times and each time he denied any knowledge of it. After the conference was concluded Vice-President Tillery wired former General Chairman Glenn who is now connected with the Man-Power Department of the United States Government. November 25th Brother Glenn replied and same is herewith quoted:

November 25th, 1943, 5:37 P. M.,

"R. J. Tillery, Wilmington Hotel, Wilmington, N. C.

Your wire date conference during May 1925 with F. W. Brown the Assistant Manager it was verbally agreed that no non-promotable firemen would be hired in the future (Stop) During the fall of 1925 some non-promotable men were hired on the Montgomery District and the Jacksonville District. Practically all of

those were eliminated from the seniority roster and I am sure by checking the roster since 1925 you will find that this understanding has been complied with on the system (Stop) Efforts were made by Pearsall and Bullock to hire non-promotable men on Richmond and Fayetteville District and on protest by the committee they were instructed to hire only promotable men.

(Signed) R. L. GLENN."

An attempt was then made to appeal to Vice-President, F. W. Brown, however, he declined to meet the officers of the Brotherhood. Vice-President Tillery finally succeeded in contacting him by telephone, and among other things, called attention to the gentlemen's agreement he had with former General Chairman Glenn. Brown denied that he had ever talked with Glenn about the matter. Later Vice-President Tillery personally talked with Glenn and he confirmed his statement made by wire, which has heretofore been quoted.

After all efforts had apparently failed to effect a settlement through conferences with the management the following letter was sent to General Manager Sibley:

"Wilmington, N. C.,
December 1, 1942.

Mr. C. C. Sibley, General Manager, Atlantic Coast Line Railroad, Wilmington, N. C.

DEAR SIR:

Referring our conference November 24th, regarding the employment of non-promotable firemen.

You declined to discontinue the practice of employing such men and I have since undertaken to appeal or at least talk with Vice-President Brown about the matter. Mr. Brown declined to see me.

We made it very clear to you that we were ready and willing to cooperate with the company in securing suffi-

cient promotable men to meet all needs. You made no comment in this connection and of course we can only assume the Company does not desire our cooperation. We undertook to point out to you and now repeat, that it is unfair to the promotable men to have the jobs as firemen filled with non-promotable men who apparently have no responsibilities except to act as firemen and eventually become drones, while the promotable men must study, purchase expensive books, etc. and if they fail to pass the very strict examinations required of them they are removed from the service. The non-promotable men therefore do not contribute to the efficient and safe operation of the railroad. The general public certainly is vitally interested in safety at least.

The promotable men now being hired by the Atlantic Coast Line are all Negroes, so far as we know. These Negroes are non-promotable because the management has decreed that they be non-promotable. We found, at the conference, that you indicated a desire to discuss discrimination as between the Negro and white race. In that connection you said nothing about the company promoting only white men to the position of locomotive engineers.

We are indeed sorry that the management has taken the position it has in this important matter and hope that upon further reflection our position will be agreed to, as certainly your decision given at the conference will not be accepted.

Very truly yours,

(Signed) R. J. Tillery,
Vice-President, B. of L. F. & E.

Copy to:

Thad S. Lee, Gen. Chmn.
B. of L. F. & E."

On December 9th, General Chairman Lee convened the entire general grievance committee in Jacksonville, Florida,

and after very thorough consideration was given the entire matter the following resolution was unanimously adopted.

"Whereas, the management of the Atlantic Coast Line Railroad entered into a gentlemen's agreement in 1925 or thereabouts with a representative of the Brotherhood of Locomotive Firemen and Enginemen to the effect that no more non-promotable men would be employed as locomotive firemen and from 1927 to latter part of 1942 this agreement has been fully complied with by the employing officers of the railroad, and

"Whereas, beginning about November 1, 1942, the management of the railroad began employing non-promotable men some of whom have now actually established seniority by performing service for pay, and

"Whereas, the General Chairman and the Executive Committee with the assistance of a Grand Lodge Officer have failed through peaceful negotiations to induce the management to observe the gentlemen's agreement above referred to, and

"Whereas, through these peaceful negotiations the Brotherhood of Locomotive Firemen and Enginemen have been unable to effect a settlement of the dispute, therefore be it

Resolved, that the entire matter be submitted to the membership and other firemen, hostlers and hostler-helpers on the Atlantic Coast Line Railroad and the Charleston and Western Carolina Railway Company, in the form of a strike ballot, so that they may decide for themselves whether they will leave the service and participate in a strike in accordance with the laws of the Brotherhood of Locomotive Firemen and Enginemen if a satisfactory settlement cannot otherwise be reached, and be it further

Resolved, that the General Chairman with the assistance of the Grand Lodge officer assigned to assist, be hereby is authorized and directed to prepare and forward to the Local Chairman and Assistant Local Chairman the strike ballot with necessary instructions for taking the vote, and such instructions to include fixing

a time and date for counting the vote and announcing the results, and be it further

Resolved, that in event a majority vote in favor of withdrawing from the service, the General Chairman and Grand Lodge Officer, shall have authority, with the approval of the International President, to fix a date and time for the strike to become effective and to issue necessary instructions for the conduct of the strike.

Jacksonville, Florida

December 9th, 1942

The Committee then adopted a motion as follows:

"That because of the fact that the Jacksonville Terminal Company is not represented by the management of the Atlantic Coast Line Railroad and the Charleston and Western Carolina Railway, and the further fact that no attempt has been made by the management of the Jacksonville Terminal Company to violate the agreement by hiring non-promotable men as locomotive firemen, hostlers and hostler-helpers, it is the sense of this committee that the resolution, just adopted, providing for the spreading of a strike ballot on the Atlantic Coast Line and Charleston and Western Carolina Railway, will not apply to the Jacksonville Terminal Company unless the management of the Jacksonville Terminal Company later violate the agreement by hiring non-promotable men. In that event, the General Chairman and the Grand Lodge Officer assigned, are hereby authorized and directed to arrange for a strike ballot to also be spread on the property.

From the foregoing it will be quite evident to you that the management has decided to completely disregard the gentlemen's agreement of long standing without just cause, thereby restoring a condition existing prior to 1925. In other words, all hiring assignments of any importance will be filled by non-promotable firemen. The reason for the management adopting this policy, in the opinion of the committee, is for the purpose of weakening the organiza-

tions on the property. Certainly there could be no point in hiring men who cannot, under the management's policy, follow through in any position which they may qualify for promotion. Non-promotable firemen regardless of education or ability when hired, will have very little incentive and naturally become drones. They will, however, fill the places where the promotable men must get their training in order to become efficient and safe engineers.

Therefore, the appropriate representatives of the organization representing the agreement, after a full review of the circumstances related to the situation, have voted unanimously to refer the matter to the membership and others employed in the capacities represented by the organization, for their consideration and vote as to whether or not they are in favor of peacefully withdrawing from the service and engaging in a legal strike authorized in accordance with the laws of the organization, unless a settlement satisfactory to the General Chairman and Grand Lodge Officer assigned can be reached before date strike is scheduled to begin.

This statement is submitted for your information.

Attached is a ballot on which you will cast your vote for or against a strike. Sign your name, occupation, lodge number—if a member—and place in envelope provided which is marked "ballot," and hand to the party who furnished you with this statement and ballot.

Your fraternally,

THAD S. LEE
General Chairman, B. of L. F. & E.
ATLANTIC COAST LINE
CHARLESTON & WESTERN CAROLINA.

Approved:

R. J. TILLERY
Vice-President
B. of L. F. & E.

(Copy)

Ballot

I have carefully read the attached statement with reference to the hiring of non-promotable firemen, and hereby cast my vote —— ———— a strike if settlement satisfac-
For Against
tory to the Grand Lodge Officer and General Chairman cannot be obtained. I hereby authorize the Grand Lodge Officer assigned and the General Chairman or their duly authorized representative to act as my agents or attorneys in the further handling of the matter.

Name .....

Occupation .....

Member B. of L. F. & E. Lodge No. .....

Non-Member .....

Motion on Behalf of Brotherhood of Locomotive Firemen and Enginemen to Dismiss or to Stay Further Proceedings

The Defendant, Brotherhood of Locomotive Firemen and Enginemen, moves the Court as follows:

1. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this Court is invoked solely on the ground that the action arises under the Constitution and Laws of the United States, and (b) the defendant Brotherhood of Locomotive Firemen and Enginemen is an unincorporated association, which has its headquarters and principal place of business in the City of Cleveland, State of Ohio, and the said defendant Brotherhood of Locomotive Firemen and Enginemen is not an inhabitant of the District of Columbia but is an inhabitant of the City of Cleveland, Ohio.

2. To dismiss the action on the ground that this defendant was not properly served with process. No officer, managing or general agent, or any other agent authorized to receive service of process in the District of Columbia has been served with process in this action.

3. To dismiss the action on the ground that the subject matter and the parties are the same as the subject matter and parties in other actions brought in other district courts and now pending. In the alternative, further proceedings in this action should be stayed.

Affidavit of Glenn C. Russell

DISTRICT OF COLUMBIA, ss:

Glenn C. Russell, being duly sworn, deposes and says:

1. He is an employee of the Brotherhood of Locomotive Firemen and Enginemen, whose principal offices are in Cleveland, Ohio. Mr. Jonas A. McBride is a Vice President and national legislative representative of the said Brotherhood, and his office is at 10 Independence Avenue, S. W., Washington, D. C. Mr. McBride and the affiant are the only persons in that office.

2. For several months Mr. McBride has been absent from Washington due to severe illness and operation, and convalescence. On October 29, 1947 a gentleman called at this office with process he desired to serve on Mr. McBride. I advised him that Mr. McBride was absent from the city and he left a copy of the complaint brought by LeRoy Graham and others against the Southern Railway Company and others upon a filing cabinet in this office.

3. My position is that of clerk-stenographer to Mr. McBride. I have no other authority or duties from or with the Brotherhood of Locomotive Firemen and Enginemen. No papers in the aforesaid action were served upon me or attempted to be served upon me.

GLENN C. RUSSELL.

Affidavit of D. B. Robertson

D. B. Robertson, being duly sworn, on oath deposes and says as follows:

I am President of the Brotherhood of Locomotive Firemen and Enginemen and have continuously held that office since 1922.

The Brotherhood of Locomotive Firemen and Enginemen, (hereinafter referred to as Brotherhood), is an unincorporated association having its principal office and general headquarters in Cleveland, Ohio, where the principal affairs and business of the organization have been transacted since May 1, 1917, pursuant to the provisions of Article 1, Sec. 5, of the Brotherhood Constitution, which provisions have been continuously in force since January 1, 1917.

Headquarters Location

> "Sec. 5(a) The headquarters of the Grand Lodge, including all departments, shall be located in the City of Cleveland, Ohio."

The administrative personnel of the Brotherhood consists of a President, Assistant President, Resident Vice President, General Secretary and Treasurer, Editor and Manager of the Magazine, and a Board of Directors of five members, all of whom have their offices in the Keith Building, Cleveland, Ohio, where there is employed a staff of Grand Lodge employees numbering approximately eighty-five persons who are assigned to work in the departments of the President, General Secretary and Treasurer, Editor and Manager, and Board of Directors. The President, Assistant President, General Secretary and Treasurer, and Editor and Manager have resided in Cleveland, Ohio, since election to their respective positions; all of their time, as well as that of the employees, during business hours is devoted to the service of the Grand Lodge.

By constitutional provision the Board of Directors is required to meet at Grand Lodge headquarters in January and July of each year to hear and decide such appeals from the decisions of the President as may have been progressed to the Board under the Brotherhood Constitution, to serve as members of the Finance Committee, and to transact such other business as may properly come before the Board. Each semi-annual session of the Board usually consumes from six to eight weeks.

There is maintained and operated by the Grand Lodge at Cleveland, Ohio, a Protective Department, for members engaged in engine service, under the primary supervision and

direction of the President, who is the chief executive officer of the Brotherhood and all its departments. There are also maintained and operated at Cleveland, Ohio, under the primary supervision of the General Secretary and Treasurer, departments issuing insurance certificates to Brotherhood members who can qualify therefor, these departments being the Beneficiary Department, Mutual Insurance Department, Benevolent Department and Accident Indemnity Department. The offices of the General Secretary and Treasurer have complete facilities for the administration of the insurance departments including the processing of all applications for insurance and the adjustment of claims. By the provisions of Article 8 of the Brotherhood Constitution all contracts of insurance issued by the Brotherhood are deemed in all respects to be made under and are to be governed by and interpreted and construed in accordance with the laws of Ohio, and, hence, are Ohio contracts.

Under the supervision of the Editor and Manager of the Magazine the Brotherhood edits and publishes at Cleveland, Ohio, in the offices of the Grand Lodge, a monthly magazine for distribution to all of its members.

For the purposes of paying salaries of Grand Lodge officers and employees, and other current operating expenses, of the Grand Lodge only, there is maintained by the Grand Lodge a General Fund into which all members pay assessments. Other funds held by the Grand Lodge are national legislative and insurance funds, the latter of which are used for the purposes of defraying the expense of operating the insurance departments and the payment of claims.

Fiscal resources of the Grand Lodge, composed of securities and cash, are deposited with banks in Cleveland, Ohio, with the exception of minor sums in cash kept on deposit with The Canadian Bank of Commerce at Toronto, Ontario, in compliance with the Canadian Foreign Exchange Control Act. Disbursements for payment of bills and claims are made by checks drawn on the depository banks by the General Secretary and Treasurer from his office in Cleveland, Ohio, and transmission to creditors and beneficiaries is made normally by mail.

All books, records and accounts of the Brotherhood are kept in the Grand Lodge office in Cleveland, Ohio, by employees assigned to such duties. And correspondence with members dealing with the affairs of the Grand Lodge is conducted from the Grand Lodge office in Cleveland, Ohio, where the files relating to such matters are maintained.

The Finance Committee of the Brotherhood, composed of the President, Assistant President, General Secretary and Treasurer, and the members of the Board of Directors, has general supervision of the financial affairs of the organization and control over the investment of its funds. This Committee meets when occasion requires in the office of the Grand Lodge at Cleveland, Ohio to transact its business.

The membership of the Brotherhood is scattered throughout every state of the United States and every province of Canada. This membership is grouped into local lodges, of which there are about 960, according to the desire and efforts of the members themselves. The location of the lodges, their names, and their by-laws are determined according to the will of the members who organize them. Among the subordinate lodges are the defendants, Ocean Lodge No. 76, Norfolk, Virginia; Devotion Lodge No. 403, Portsmouth, Virginia; and Port Norfolk Lodge No. 775, Portsmouth, Virginia. Each of the subordinate lodges is within itself a separate unincorporated association. The members of each lodge by majority vote select the place and time of their meetings, elect and remove subordinate lodge officers, and prescribe the assessments payable for the operation and maintenance of the lodge without control by the Grand Lodge. Such assessments for the maintenance and operation of subordinate lodges are paid by the members directly to the financial secretary of the subordinate lodge, to be held in such depositories and to be disbursed under such conditions as the members of each subordinate lodge may decide. Subordinate lodge funds are the sole property of the lodge and are not subject to control by the Grand Lodge or by Brotherhood members generally.

Subordinate lodges are located at division points on railroads and derive their membership from railroad employees

working in adjacent areas. Ocean Lodge No. 76 is made up of employees of the Norfolk & Western Railway and the Norfolk Southern Railway. Devotion Lodge No. 403 is made up of employees of the Southern Railway, while Port Norfolk Lodge No. 775 has members employed on both the Atlantic Coast Line Railroad and Seaboard Railway. Only one member of said Lodge No. 775 is in the employ of defendant Railway and said member is not a locomotive fireman. None of said lodges, nor the aggregate of them, fairly and adequately represent the interests of the Brotherhood, the subordinate lodges or the membership. None of said lodges served or participated in the service of the notice of March 28, 1940, quoted in the complaint, nor did any of them take part in the consummation or negotiation of any agreement alleged in the complaint, nor did any of said lodges in any way participate in any activity having as its result the alleged wrongful removal of plaintiff from his assignment as a fireman with defendant railway.

Given under my hand this 30th day of April, 1947.

(Signed) D. B. Robertson.

State of Ohio,
County of Cuyahoga, ss:

I, Clarence D. Theis, a Notary Public in and for the County and State aforesaid, do hereby certify that D. B. Robertson, the person who signed the foregoing affidavit, made oath before me that the matters and things therein set forth are true.

Given under my hand and Notarial Seal this 30th day of April, 1947.

C. D. Theis, Notary Public. My commission expires June 4, 1948.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 4330-47

LEROY GRAHAM et al., Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY et al, Defendants

Order Denying Motion by Defendant Brotherhood of Locomotive Firemen and Enginemen to Dismiss or Stay Further Proceedings in This Case.

This cause came on to be heard on the motions of the defendant Brotherhood of Locomotive Firemen and Enginemen to dismiss the action (a) on the ground of improper venue, (b) on the ground that defendant Brotherhood was not properly served with process, and (c) on the ground that the subject-matter and the parties are the same as the subject-matter and the parties in an action entitled *Rolax et al.* v. *Atlantic Coast Line Railroad et al.*, which action is Civil Action No. 670, in the District Court of the United States for the Eastern District of Virginia, or in the alternative to stay further proceedings in this action because of the pendency of the said action in the District Court of the United States for the Eastern District of Virginia;

And the court having considered the affidavits of Glenn C. Russell and D. B. Robertson in support of the said motion and having heard testimony and argument by counsel, in open court, and it appearing to the court that the defendant Brotherhood is doing business within the District of Columbia, that the defendant subordinate lodges which were served with process are agents of the defendant Brotherhood for that purpose, and that the defendants William Lacey and Marven M. McQuade and J. P. Reynolds, who were served with process are officers of subordinate lodges of the defendant Brotherhood and that their duties and relation to the defendant Brotherhood are such that it is reasonable to conclude that they would give notice of this action to the proper officers of the defendant Brotherhood, now, therefore,

It is ordered that each of the said motions by the defendant Brotherhood of Locomotive Firemen and Enginemen be and the same hereby are denied.

Motion of the United States for Leave to Appeal as Amicus Curiae

The United States of America hereby moves for leave to file a memorandum as amicus curiae in this case because of the public interest involved in the enforcement of a federal statute, the Railway Labor Act. The grounds for the application, the points and authorities in support thereof, and a statement of the Government's position are set forth in the attached memorandum.

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[1]

In the District Court of the United States for the District of Columbia

Civil Action No. 4330-47

LeRoy Graham et al., Plaintiffs,

vs.

Southern Railway Company et al, Defendants

Washington, D. C.,

Monday, November 10, 1947.

The above-entitled action came on for hearing on motion of plaintiffs for temporary injunction; on motion for judgment dismissing the complaint as to defendant, Seaboard Air Line Railroad Company, or, in the alternative, for an order staying all further proceedings against defendant, Seaboard Air Line Railroad Company; on motion on behalf of Brotherhood of Locomotive Firemen and Enginemen to dismiss or to stay further proceedings; on motion to quash the return of summons and to dismiss the action; and on motion of defendant, Atlantic Coast Line Railroad Company to quash and vacate the purported service of process [2] and to dismiss the bill of complaint, before the Hon. Alexander Holtzoff, Associate Justice, at 10:00 o'clock a. m.

Appearances:

On behalf of the Plaintiffs: Rauh & Levy, by Irving J. Levy, Esq.

On behalf of the Defendant, Seaboard Air Line Railroad Company: Frank J. Wideman, Esq., Washington, D. C.; W. R. C. Cocke, Esq., and James B. McDonough, Jr., Esq., Norfolk, Virginia.

On behalf of the Defendant, Southern Railway Company: Hamilton & Hamilton, by Henry L. Walker, Esq., and William B. Jones, Esq.; Sidney S. Alderman, General Counsel.

On behalf of the Defendant, Atlantic Coast Line Railroad Company: Robert R. Faulkner, Esq.

On behalf of the Defendant, Brotherhood of Locomotive Firemen and Enginemen: Schoene, Freehill, Kramer & Fanelli by Lester P. Schoene, Esq.

On behalf of the United States: Robert L. Stern, Esq.

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[45]

The Court: Let me ask you this question: Has the Southern Railway Company been admitted to do business in the District of Columbia?

Mr. Faulkner: The Atlantic Coast Line?

The Court: The Atlantic Coast Line or the Southern Railway?

Mr. Faulkner: I would say the Coast Line is doing business, under decisions of this Court as recently decided, but we have filed no consent to be sued here and we so state in the affidavit.

The Court: Of course this Court is a little different from other Federal Courts. It has the same jurisdiction that a State Court would have, as well as the same jurisdiction that a Federal Court would have elsewhere. This suit could have been brought in the State Court, could it not, in any jurisdiction in which service could be properly obtained against the defendants?

Mr. Faulkner: I don't know, if Your Honor please.

The Court: I am inclined to think so.

Mr. Faulkner: But our point is, however, it is brought in this Court, which is a Federal Court.

The Court: Well, it has dual jurisdiction. Under the District of Columbia Code this Court has jurisdiction over any corporation actually doing business in the District of Columbia.

There is a case holding that the Louisville and Nashville Railroad Company is not doing business in this jurisdiction because the Louisville and Nashville has only an office for soliciting business and not for the sale of tickets, and it doesn't run any train in the District of Columbia, but I presume there is no dispute of the fact that the Atlantic Coast Line maintains a regular ticket office here.

Mr. Faulkner: No, no ticket office. We maintain a soliciting office.

The Court: Well, the Southern Railway Company maintains a ticket office, does it not?

Mr. Walker: Yes, Your Honor, it does. The Southern doesn't challenge the fact it is doing business in the District of Columbia.

The Court: Doesn't it come down to this, whether this Court can take jurisdiction under the local statute as well as under the Federal Statute?

We will take our mid-morning recess at this time and I suggest you consider this point.

(Thereupon, a short recess was taken.)

The Court: You may proceed, Mr. Faulkner.

Mr. Faulkner: If the Court please, to clarify the record, at least in my mind, may I secure from Your Honor just what question you have now reserved in your mind? Are you satisfied if this were purely a District Court question, that is, if it lies in a District Court as a U. S. District Court, that the Court would not have jurisdiction?

The Court: The question that is in the Court's mind is whether this Court doesn't have jurisdiction under the District of Columbia Code if these defendants are doing business in the District of Columbia.

As I said before, this Court has dual jurisdiction. It has the same jurisdiction as a Federal Court and it has also approximately the same jurisdiction as a State Court would have in a number of the States, because there are no courts

in the District of Columbia corresponding to State Courts. This Court has all local jurisdiction as well as all Federal jurisdiction.

Now, then, if this suit could have been brought in a State Court (and that is the point that is bothering me) is whether it couldn't have been brought in this Court under the District of Columbia Code.

Under the District of Columbia Code this Court has jurisdiction of any corporate defendant that is doing business in the District. That is a point I would like to have you address yourself to because that is the point that is really bothering me.

Mr. Faulkner: Since Your Honor took the recess I have just spoken to counsel for the Brotherhood and they say they are prepared to answer that question, and may I let them answer that question and proceed with my remaining point?

The Court: Yes, indeed.

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The Court: I am now passing on the Southern and Atlantic Coast Line to dismiss for proper venue, and I am going to deny those motions because this Court has dual jurisdiction. It is a Federal Court, as was held in the O'Donoghue case. Under its jurisdiction as a Federal Court the venue would be improper because the defendant Southern Railway Company and the defendant Atlantic Coast Line Railroad are not inhabitants of the District of Columbia, within the purview of the Federal statute. However, this Court also has local jurisdiction and under its local jurisdiction any corporation doing business in the District of Columbia, even though they are not inhabitants of the District of Columbia under the Federal statute, are subject to suit here.

To be sure, the right sought to be enforced here is a Federal right, but there are many Federal rights that can be enforced in local courts. State Courts, for example, have jurisdiction over actions to enforce Federal rights, and when the Congress wants to exclude jurisdiction of State Courts to enforce Federal rights it is a custom expressly to

provide that the jurisdiction of Federal Courts shall be exclusive.

For example, it was held that the jurisdiction of the Federal Courts as to patent cases and as to causes of admiralty is exclusive, but ordinarily when a cause of action is a right by a Federal statute and nothing is said to the contrary, that action may be brought in the State Court to vindicate that State right. Consequently, this Court has jurisdiction under the District of Columbia Code as a local court as well as a Federal Court over this suit.

The Southern Railway Company admits that for the purpose of the District of Columbia Code it is doing business in the District of Columbia. I do not understand that that is disputed by the Atlantic Coast Line. For these reasons I deny those motions.

Are there any other preliminary motions?

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The Court: I think I will dispose of the venue matter first. I am going to deny the motion to dismiss for improper venue. I confess if there were no authority on this point I would be inclined to grant the motion because I would be inclined to hold that the Brotherhood is not doing business in the District of Columbia; the analogy to those cases which hold that a railroad company isn't doing business in the District of Columbia if it maintains an office merely for the purpose of soliciting business as distinguished, say, from maintaining a ticket office at which tickets are sold.

I have read the opinion of the Circuit Court of Appeals for the Fourth Circuit, Tunstall vs. Brotherhood, and I am constrained to the opinion that that Court ruled the other way. That Court states that the Brotherhood was operating as bargaining agent in enforcing the rights of employees and that this service did bring the Brotherhood within the Court's jurisdiction and as performing through subordinate lodges and officers of those lodges. In other words, the activities of the Brotherhood in acting through its lodges in the District of Columbia is doing business in the District of Columbia.

Another point that is made by Judge Parker is that in collecting dues in the District of Columbia it is transacting business in the District of Columbia.

I realize, of course, that a decision of the Circuit Court of Appeals of another Circuit is not binding on this Court. However, it has a persuasive influence, and while I would be inclined not to follow it if I were absolutely and firmly convinced that that decision were wrong, where I have any doubt about the matter I think it behooves me to follow the decision of the Circuit Court of Appeals of another Circuit particularly in view of the fact that the opinion by the Court is written by such an eminent jurist as Judge Parker, and the opinion is unanimous, so I am going to deny the motion to dismiss for improper venue.

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The Court: That is a question of fact after all. I don't know what the facts were in the Tunstall case. Of course, the Plasterers' case is a binding authority on me. The Tunstall case is not.

Under the Plasterers' case I have to make a finding of fact on the basis of the evidence to the effect that the officer of the local union, who was served, would in due course have probably notified the parent union of the fact he was served because of his duties and functions, and that was done apparently in the Plasterers' case on the basis of evidence presented.

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[109] Washington, D. C.,
Tuesday, November 25, 1947.

The above-entitled action came on for hearing on the defendant Brotherhood's motion to quash and to dismiss the action and on motion for preliminary injunction, pursuant to the adjournment taken on November 17, 1947, before the Hon. Alexander Holtzoff, Associate Justice, at 10:00 o'clock a. m.

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Mr. Schoene: I will call Mr. Lacey to the stand, please.

Thereupon WILLIAM MANUEL LACEY was called as a witness on behalf of the Defendant, Brotherhood, and having been first duly sworn testified as follows:

Direct examination.

By Mr. Schoene:

Q. Mr. Lacey, are you a member of the Brotherhood of Locomotive Firemen and Enginemen?

The Court: Let's first get the witness' full name.

By Mr. Schoene:

Q. Would you state your full name and address?
A. William Manuel Lacey.
Q. Are you a member of the Brotherhood of Locomotive Firemen and Enginemen?
A. I am, sir.
Q. To what local lodge do you belong?
A. 532.
Q. What is the composition of that local lodge?
A. Meaning just what?
Q. Where do the members of that lodge find employment? Where are the members of that lodge employed?
A. In the Washington Terminal Company.

The Court: May I inquire, is Mr. Lacey the gentleman who was served?

Mr. Schoene: He is one of the gentlemen who was served, yes.

The Witness: Washington Terminal Company.

By Mr. Schoene:

Q. Washington Terminal Company?
A. That is right; one lodge system.
Q. Are any of the members of your local lodge employed on the Southern Railway or the Seaboard Air Line or the Atlantic Coast Line?
A. No, sir.
Q. Does the local lodge participate in any way in the negotiation of schedule agreements relating to railroads, rates of pay, or working conditions?

A. Pertaining to our local, yes.

Q. You have a schedule agreement with the Washington Terminal, do you not?

A. That is right.

Q. Who negotiates that?

A. The General Chairman; our General Chairman is the local Chairman inasmuch as we ony have the one lodge.

Q. But he is serving then as the General Chairman as distinguished from the local Chairman: is that correct?

A. He is both. You see, we only have one lodge.

Q. He is the same man?

A. That is right.

Q. Do you know by what authority that function is vested in him?

A. He was duly elected by the members and was given authority to prosecute the contract when necessary.

Q. Are you familiar with Section 12(a) of Article 15 of the constitution of the Brotherhood?

A. No, I wouldn't be by number.

Q. I show you that and ask you to read it. Read the section to which I have referred. I want you to read it out loud.

The Court: No, no; the exhibit is in evidence.

By Mr. Schoene:

Q. Does the section that you have read clarify the question of the authority by which the General Chairman acts in negotiating the contract?

A. That is right.

Q. He acts pursuant to that section, does he?

A. That is right.

Q. Do you collect insurance payments?

A. No, sir, I do not collect them.

Q. Your function is what, in connection with the local lodge?

A. My function in the local lodge is to naturally take the minutes, who the presiding officer is, and the actions during that meeting.

The Court: What office do you hold?

The Witness: Recording Secretary, Your Honor.

By Mr. Schoene:

Q. Do you make reports to Grand Lodge?

A. No, I make no report to the Grand Lodge, so to speak, other than you see I am a party to the yearly audit and any correspondence with the Grand Lodge is generally in the way of a resolution adopted by the members, or a protest of some national movement and our lodge votes a protest for being delayed or otherwise, such as that. Other than that mine is strictly local.

Q. Is there any effect on the Washington Terminal property, any provision concerning the distribution of assignments between promotable and non-promotable firemen?

A. No.

The Court: How is that relevant to this question?

Mr. Schoene: I think, Your Honor——

The Court: I want to confine this matter strictly to the question of service, because this is a preliminary matter.

Mr. Schoene: Yes. I think, Your Honor, that it is pertinent because in the Operative Plasterers case some emphasis was put on the fact that the functions of the local officer there involved were very closely related to the subject matter of the suit. The Court there stated——

The Court: I know, but your question relates to the contents of a bargaining agreement and it is not involved in this case and I shall exclude that.

By Mr. Schoene:

Q. Have you at any time ever had occasion to participate in the handling of any question relating to the assignment of work between promotable and non-promotable firemen?

A. No.

The Court: Well, have you had occasion to handle any question relating to labor relations between members of your local and the Washington Terminal Company?

The Witness: No, Your Honor. The General Chairman takes care of that. That is the Protective Department.

By Mr. Schoene:

Q. Are there any non-promotable firemen employed in the Washington Terminal?

A. No.

Mr. Schoene: You may cross-examine.

Cross-examination.

By Mr. Levy:

Q. Mr. Lacey, does your subordinate lodge have any separate constitution or by-laws other than the constitution of the parent lodge?

A. We have what is known as a schedule, the contract working conditions in our local terrritory.

Q. But so far as the operations of your lodge business goes you do not have any separate by-laws or constitution: isn't that right?

A. That is right.

Q. And your duties are determined by the constitution of the parent Brotherhood, are they not?

A. With maybe a few exceptions that the Grand Lodge wouldn't take exception to.

Q. I am sorry; I didn't follow that; exceptions of what kind?

A. We may deviate a little due to some conditions that exist in our local territory but as you say, mostly it corresponds with the constitution.

Q. Your duties, the duties of a recording secretary of a subordinate lodge, are set forth in this constitution, are they not?

A. That is right.

Q. Under the constitution are you required to forward applications for member's insurance to the General Secretary-Treasurer?

A. I am not. I could, but I do not, because that is handled by the local organizer.

Q. Are you familiar with Section 22(d) of Article 14 of the constitution?

A. Not according——

The Court: No, Mr. Levy, I venture the suggestion—I am not going to preclude you but I don't think it is necessary because I think the constitution speaks for itself and the text of the constitution is better evidence than this witness' recollection.

Mr. Levy: Thank you.

By Mr. Levy:

Q. Mr. Lacey, at the Washington Terminal do trains of the Southern Railway come in and out of the Terminal?

A. The Southern Railway trains do come in and out, although the main line crew is cut off at Alexandria.

Q. But the actual trains come in and out of the Terminal?

A. That is right.

Q. In connection with the Atlantic Coast Line do the cars of the Atlantic Coast Line, freight and passenger cars, come in and out of the Terminal?

A. We refer to them as R. F. & P. trains.

Q. Do the trains which bear the legend "Atlantic Coast Line" right on the cars, do they come in and out of the Terminal? Have you ever seen them?

A. They are a combination. Some of them are part of the Coast Line and they have the R. F. & P. coaches in them.

Q. The R. F. & P. locomotives bring the A. C. L. cars in and out of the Terminal?

A. Yes, but as far as we are concerned the railroads terminate at Richmond.

Q. I am asking you what you see at the Washington Terminal.

A. Oh, yes.

The Court: I don't want to interfere with the questioning, but I don't see the pertinency.

The Witness: I may explain it this way: It doesn't make any difference——

The Court: No, just answer the question.

By Mr. Levy:

Q. The question is whether in the course of your duties in and around the Washington Terminal you observe regularly cars, passenger cars and freight cars, of the Atlantic Coast Line coming in and out of the Terminal.

A. Oh, yes.

Q. A great many of them?

A. Oh, yes.

Q. Is that true with respect to the cars of the Seaboard Air Line Railway Company?

A. Them cars come in, too, on the R. F. & P. trains.

The Court: The Seaboard is out of this case.

Mr. Levy: Well, Mr. Schoene asked about the Seaboard. I have no further questions.

The Court: Any redirect examination?

Mr. Schoene: I think not.

The Court: You may step down.

(Witness excused.)

Mr. Schoene: I would like to call Mr. Reynolds. Thereupon—

JAMES PRESTON REYNOLDS was called as a witness on behalf of the Defendant Brotherhood and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Schoene:

Q. Mr. Reynolds, will you state your full name, please?

A. James Preston Reynolds.

Q. Are you a member of the Brotherhood of Locomotive Firemen and Enginemen?

A. I am.

Q. To what local lodge do you belong?

A. 532.

Q. That is the Washington Terminal Lodge?

A. That is the Washington Terminal Lodge.

Q. Do you hold an official position in that lodge?

A. Financial secretary.

The Court: What position do you hold?

The Witness: Financial secretary.

The Court: Try to speak a little louder so that we can all hear you.

By Mr. Schoene:

Q. As financial secretary do you make collections of funds on behalf of the local lodge?

A. I do.

Q. Do you make collections which are transmittgd to the Grand Lodge?

A. That is right.

Q. Will you describe the form on which you make those transmissions to the Grand Lodge?

A. It would be right hard to say. It is a very good size type of ledger with the individual's names on it, and so forth.

Q. Do you receive that form from the general secretary-treasurer?

A. I do.

Q. Is it partially filled out when you get it?

A. It is.

Q. What information is shown on it when it comes to you?

A. The returns that I should return to them, what I have collected from the members.

Q. Does it show what each member owes to the Grand Lodge?

A. It does.

Q. That is shown on the form when it comes to you from the office of the general secretary-treasurer?

A. That is right.

Q. Is that correct?

A. That is right.

Q. And if you have that money in your possession you return it, do you, with that form?

A. What the form calls for I return to the general secretary and treasurer.

Q. And if you have not made some collections that are shown on the form you indicate that fact, do you, by alteration of the form?

A. That is right.

Q. Is that all that you do to the form?

A. That is all.

Q. You simply send it back with the money: is that right?

A. That is right.

Q. Is the testimony which you have given a description of your handling of all funds for the Grand Lodge?

A. That is right.

Q. Do you make any disbursements of strike benefits?

A. How do you mean?

Q. If, for example, you had the members of your lodge on strike, would you be the disbursing officer for strike benefits?

A. Yes, I would.

Q. How would you disburse the funds?

A. First I would have to get a voucher, and that comes from the recording secretary by the sanction of the lodge that he is to be paid; and if they say no then I do not pay him.

Q. Are strike benefits paid from the local lodge funds?

A. I have never seen that happen since I have held office, so I don't know how to answer that.

Q. Do you know how strike benefits are paid?

A. No.

Mr. Schoene: That is all.

Mr. Levy: I have no cross-examination.

The Court: You may step down.

* * * * * * *

[135] Ruling on Motion to Quash Service of Process

The Court: Motion to quash service of process on the defendant Brotherhood is denied. The motion is of the type frequently referred to as technical and dilatory, and the courts will be astute not to sustain such a motion in cases where it is clear that notice actually reached the defendant.

There are two provisions of the Federal Rules of Civil Procedure that are pertinent in this connection and which should receive consideration. Rule 4(d)(7) permits service on a corporation or partnership or unincorporated associa-

tion in a manner prescribed by the local law. The local law on the subject is found in the District of Columbia Code, 1940 edition, Title 13, Section 103, which permits service on foreign corporations by leaving process at the place of business of the local agent if the local agent is absent from the company's office.

The Court realizes, of course, that the Brotherhood is an unincorporated organization. Probably the reason unincorporated associations are not included in Section 103 of Title 13 is that when that section was enacted unincorporated associations were not subject to suit, but if Section 103 applies then service on Mr. Russell, who was the subordinate of the vice president of the Brotherhood, service being made on him in the vice president's absence from the office, would be sufficient.

In view of the omission, however, of unincorporated associations from Section 103, the Court will not base its decision on that section, but that section is referred to in order to show that under the laws of the District of Columbia service will be permitted by leaving the process in the office of the party served, and if that section were enacted today no doubt it would include unincorporated associations.

The Court, however, is sustaining this service on two grounds: First, as was held by the Circuit Court of Appeals for the Fourth Circuit, in an opinion written by Judge Parker, in *Tunstall* vs. *Brotherhood of Locomotive Firemen and Enginemen*, 148 Federal (2d) 403, the local unions or lodges are to be deemed as agents of the Brotherhood for the purpose of service of process, and therefore service on the local lodge is service on the Brotherhood.

It must be borne in mind that this case is particularly important because it involves the same organization as that involved in this case.

The second ground on which the service is sustained is that William Lacey, the recording secretary of the Washington local, is to be deemed a local agent of the Brotherhood, for the purpose of service on the Brotherhood. The Court is basing this conclusion on the decision of the United States Court of Appeals for the District of Columbia in the case of *Operative Plasterers, etc. Association* vs. *Case*, 93

Federal (2d) 56, at page 65, in which Mr. Justice Stephens wrote the opinion.

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[141] Ruling of the Court on Motion to Stay Proceedings

The Court: I am going to deny this motion because there is a distinction between this case and the Seaboard's situation.

I understood in the Seaboard case the other action had proceeded far enough so that all questions of service and jurisdiction had been passed, and so the action was ready to proceed on the merits. In this case, since the Brotherhood is contesting service in the other action, we do not know whether another action is pending or not. Therefore, I shall not stay the case as against the Atlantic Coast Line.

If the defendants in the other case had submitted themselves to the jurisdiction in the other case I would make the same disposition of your motion as I made as to the Seaboard Air Line, because there, as I recall it, jurisdiction and service had already been established.

Mr. Faulkner: Then you give no consideration, as I understand, Your Honor, to the fact that that suit was filed prior to this suit, and is still pending?

The Court: Which suit?

Mr. Faulkner: The suit in Richmond.

The Court: But we don't know whether it is pending because there is a motion to quash service.

Mr. Faulkner: So far as this defendant is concerned it is still pending because we have not challenged the jurisdiction of the Court.

The Court: I know, but if the motion to quash the service is sustained then you will be in position to move to dismiss because of lack of an indispensable party, because in my opinion both the railroad and the Brotherhood are indispensable parties to the adjudication of the validity——

Mr. Falkner (Interposing): But may I offer this observation? Doesn't this case go a little further? The District Judge in the same District has already overruled such a motion. Isn't it to be presumed that this motion will likewise be overruled on next Monday, December 1st?

The Court: I can make no presumption one way or the other. All I say is that I cannot hold that the Eastern District of Virginia has taken jurisdiction of this controversy when there is still pending a motion to quash service.

As I understood it, and I want to be corrected if I am wrong, in the Seaboard Air Line case, in which I granted the motion to stay, all questions of service had been passed.

Mr. Faulkner: That is right.

The Court: And the Court had retained jurisdiction over the parties.

Mr. Faulkner: That is true, but no answers had been filed.

The Court: You see in that case if the answers have been filed, the issue can be tried on the merits probably very promptly. Here we are still in the preliminary stages, and this Court still doesn't know whether the District Court of the United States for the Eastern District of Virginia will or will not take jurisdiction of the action brought by Rolax and McGowan, so I am going to deny the motion.

Mr. Faulkner: May I make this statement of the grounds in connection with your ruling on the motion to dismiss on improper venue?

In reading the record, I may not have stated my position as clearly as I should have, that is, for the Southern and the Seaboard, that this Court sitting as a District Court has no greater jurisdiction than this Court sitting as a Federal Court.

The Court: I understood the plea but I overrule it because this Court has double venue, so to speak. If I may use the vernacular, it has double-barreled venue.

* * * * * * *

[183] Ruling on Motions for Preliminary Injunction

The Court (Holtzoff, J.): This is a motion for a preliminary injunction in a class suit brought by a number of locomotive firemen employed by the Atlantic Coast Line Railroad Company and the Southern Railway Company. The suit is brought against the railroad companies and against the Brotherhood of Locomotive Firemen and Enginemen, which is the bargaining agency under the Railway

Labor Act in behalf of the locomotive firemen employed by the two railroads.

The complaint alleges that the defendants have entered into bargaining agreements by virtue of which the plaintiffs, and other members of the class, all of whom belong to the Negro race and who are euphemistically known as non-promotable firemen, are being unfairly discriminated against in a manner that did not exist under the previous hiring practices of the two railroads. Specifically it is charged that non-promotable firemen at times lose their seniority rights and sometimes even their employment when steam power is displaced by Diesel power on any run on which a non-promotable fireman is employed, and that at times a person with less seniority is hired as a helper on a Diesel engine when a Diesel engine replaces steam power.

As the Court views this action it is primarily against the Brotherhood because the complaint shows that the Brotherhood was instrumental in securing such discriminatory action on the part of the railroads.

We are dealing here with the law regulating the duties of an agent toward his principal. No one is compelled or required to undertake an agency, but one who voluntarily assumes the task owes the duty of acting in the utmost good faith toward his principal. An agent is a fiduciary. If the principal is a group of individuals, this obligation extends to each member of the group. The agent is bound to represent the interests of each member of the group fairly and with equal zeal. He may not neglect some of the members, prefer some as against others, or discriminate among them. He may not advance the interests of some, of the prejudice of others. This is implicit in the fiduciary relationship that exists between every agent and his principal, be that principal a single individual or a group of individuals.

Applying these general principles to the situation presented in this case, the Brotherhood was under no obligation to become a bargaining agent for the employees within its craft. Having sought to do so, and having been elected to that position of trust, the Brotherhood is in duty bound to represent fairly not only its own membership, but all the employees in whose behalf it has authority to bargain.

The Brotherhood must advance equally and in good faith the interests of every individual fireman whom they represent, without preference or discrimination among them. The only permissible distinctions may be those based on seniority, efficiency, reliability, aptitude and similar considerations bearing on the quality of services rendered by the employees. No line may be drawn arbitrarily on any other basis.

A bargaining agent under the National Labor Relations Act or under the Railway Labor Act is but an agent for a principal, and not an independent contractor. His principal is the entire group of employees whom the agent represents. This is made clear by Section 2 of the Railway Labor Act and Section 7 of the National Labor Relations Act which assures to employees the right "to bargain collectively through representatives of their own choosing." The important word in this connection is the word "representatives." The bargaining agent is a representative, not an independent contractor. He is clothed with all the rights of a representative, but is subject to all the fiduciary obligations of a representative.

In the last analysis, the question is whether an employee who has a good record of efficiency and who has acquired rights based on seniority by dint of long and faithful service may be deprived of his employment by the arbitrary action of the bargaining agent, who purports to act in behalf of the entire group of which the unfortunate employee is a member. It seems to the Court that the question answers itself. We are not dealing here with any of the baffling problems and complex situations arising out of race relations. This is not a matter of race distinction in social relations between man and man. This is a matter of arbitrary classification in labor relations. The problem that confronts us is simply this: May a faithful employee who has earned a place for himself by a long period of service be stripped of his means of livelihood by his own bargaining agent? To the individual immediately concerned such an eventuality would be a disaster. To permit such a tragic result would be to tolerate a grave injustice. The law does not allow an agent to act in this manner toward any member of the group which he represents.

The final question is whether a preliminary injunction should be granted. The Court is mindful of the proposition that preliminary injunctions should be granted sparingly and hardly ever if they would disturb the status quo. There are exceptions, however.

In this case we already have rulings by the Supreme Court of the United States and by the Circuit Court of Appeals for the Fourth Circuit condemning as illegal the specific practices set forth in the complaint. Consequently no doubtful question of law is involved.

In the case of *Steele* v. *Louisville and Nashville Railroad Company*, 323 U. S. 192, Mr. Chief Justice Stone condemned practices that were very similar to those of which the plaintiffs complain, and held that agreements and activities of the type described in the complaint are violations of the Railway Labor Act. Mr. Chief Justice Stone said that:

> "• • • Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority."

He further stated that "the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent."

More recently the Circuit Court of Appeals for the Fourth Circuit, in the case of *Brotherhood of Locomotive Firemen and Enginemen* v. *Tunstall*, 163 Federal (2d) 289, in which Judge Parker spoke for a unanimous bench, also condemned practices of the kind here complained of. A judgment in behalf of the plaintiffs for an injunction and damages was affirmed.

The law, therefore, is clear. This circumstance, it seems to the Court, operates to render this case an exception to the rule that ordinarily preliminary injunctions which might disturb the status quo should not be granted.

It is objected, however, that the Norris-LaGuardia Act precludes the granting of the injunction. It seems to the

Court that this objection is answered by the case of *Virginian Railway Company* v. *System Federation No. 40*, 300 U. S. 515, 563. In that case the Court was confronted with a suit by a labor union against an employer to compel the latter to bargain collectively. The Supreme Court held that an application for an injunction of this type is not within the prohibitions of the Norris-LaGuardia Act. In this case we have a situation which is parallel in principle if not in fact. Here members of the craft seek an injunction to require the bargaining agent to perform its bargaining function faithfully. In the Court's opinion the Norris-LaGuardia Act does not apply. The Court is impressed also by the circumstance that although in the Steele case and in the Tunstall case, which was before the Circuit Court of Appeals on two occasions, the Norris-LaGuardia Act was apparently never even mentioned.

The Court realizes that the railroads have a public duty to perform. Their function is to run railroads, and in the performance of their obligations they may be constrained to enter into agreements with labor unions to prevent interference with the operation of the line. For this reason the Court will not grant any injunction against the railroads. The Court will, however, grant a preliminary injunction against the Brotherhood to enjoin and restrain the Brotherhood from insisting on any departure on the part of the railroads from previously existing hiring practices, if such departures will result in any discriminatory action as against any member of the group represented by the plaintiffs. The precise phraseology of the injunction to be granted will have to be determined on a settlement of the order to be made pursuant to the Court's decision.

* * * * * * *

[193] Preliminary Injunction

This cause came on to be heard on plaintiffs' motion for a preliminary injunction against the defendants Southern Railway Company, Atlantic Coast Line Railroad Company, and the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association; and, State University Railroad Company, a corporation organized and existing

under the laws of the State of North Carolina; The Cincinnati, New Orleans and Texas Pacific Railway Company, a corporation organized and existing under the laws of the State of Ohio; The Alabama Great Southern Railroad Company, a corporation organized and existing under the laws of the State of Alabama; Woodstock & Blocton Railway Company, a corporation organized and existing under the laws of the State of Alabama; New Orleans and Northeastern Railroad Company, a corporation organized and existing under the laws of the State of Louisiana; New Orleans Terminal Company, a corporation organized and existing under the laws of the State of Louisiana; Georgia Southern and Florida Railway Company, a corporation organized and existing under the laws of the State of Georgia; St. Johns River Terminal Company, a corporation organized and existing under the laws of the State of Florida; Harriman and Northeastern Railroad Company, a corporation organized and existing under the laws of the State of Tennessee; and Cincinnati, Burnside & Cumberland River Railway Company, a corporation organized and existing under the laws of the State of Kentucky, having intervened as defendants in this action; and counsel for the defendants Southern Railway Company, the Atlantic Coast Line Railroad Company and the intervening railroads having suggested to the court that if a preliminary injunction should issue against the defendant Brotherhood it should also be made to apply to restrain the said railroads, and the court, having considered the complaint, the affidavit of Benjamin F. McLaurin in support of the motion, and all the papers and proceedings heretofore had herein, and having heard argument by counsel, and having filed its opinion herein, makes the following

Findings of Fact

1. Plaintiffs are Negroes with long seniority as firemen on the lines of certain of the defendant railroads.

2. Defendant railroads and defendant Brotherhood, as representative of the craft of locomotive firemen and helpers under the Railway Labor Act, entered into agreements, including an agreement executed in Washington,

D. C. on February 18, 1941, (sometimes referred to as the Southeastern Carriers Conference Agreement) along with other southeastern carriers, which restricts the rights of these plaintiffs and other Negro firemen with respect to employment, job assignments, seniority rights and other conditions of employment on the basis of race.

3. As a result of the said agreements and in compliance with their terms, defendant railroads at the insistence of the defendant Brotherhood have displaced these plaintiffs and other Negro firemen from job assignments as locomotive firemen to which they were entitled by virtue of their seniority and assigned them to jobs which are less desirable, less remunerative or more onerous; plaintiffs and other Negro firemen have been denied rights to preferred runs and to positions as firemen or helpers on Diesel engine locomotives and other forms of non-steam power, to which they would have been entitled by virtue of the seniority rights which they acquired by their long periods of service as firemen.

4. The defendant Brotherhood is continuing and threatens to continue to insist upon the application by the defendant railroads of the terms of the aforesaid agreements to further discriminate against these plaintiffs, with respect to job assignments, to continue to deny them preferred runs on Diesel locomotives and otherwise to which their seniority entitles them, and in like manner to displace and discriminate against other Negro firemen employed by the said railroads on whose behalf these plaintiffs sue.

5. The loss of assignments as firemen and the denial of assignments as helpers on Diesel locomotives and the failure to accord to plaintiffs and other Negro firemen the runs to which their seniority rights entitle them constitute irreparable injury for which there is no adequate remedy at law.

On the basis of the foregoing findings of fact, the court makes the following

Conclusions of Law

1. This court has jurisdiction of the parties and the subject-matter, and venue is properly in this court.

2. The complaint states a cause of action cognizable by this court.

3. There are reasonable grounds to believe that plaintiffs will ultimately prevail in this action.

4. The agreement of February 18, 1941 and like agreements which discriminate against plaintiffs and other locomotive firemen by denying them their seniority rights and rights to job assignments on the basis of race are illegal under the Railway Labor Act (45 U. S. C. § 151 et seq.) and the conduct of the defendant Brotherhood in causing the provisions of those agreements to be enforced and applied by the said railroads is in violation of the fiduciary duties of the Brotherhood as bargaining representative under the said Act and irreparably injures these plaintiffs and other Negro locomotive firemen.

5. The provisions of the Norris-LaGuardia Act (29 U.S.C. §§ 101 et seq.) do not apply to this action.

6. A temporary injunction should issue so that pending the final hearing and determination of this action no further injury should be inflicted upon these plaintiffs or other Negro firemen employed by the said railroads on whose behalf plaintiffs also sue.

7. Although the court ruled at the hearing on November 25, 1947 that a temporary injunction should issue against the defendant Brotherhood but not against the defendant railroads, which may be said to have been constrained by the Brotherhood to enter into and apply the discriminatory agreements here involved, the said motion of said interveners for leave to intervene as defendants has subsequently been made and granted, and the defendant railroads and interveners have suggested and it now appears to the court that the temporary injunction prayed by the plaintiffs could not be made fully effective to protect the plaintiffs and others represented by them in the respects indicated in the court's opinion of November 25, 1947, unless the said temporary injunction should apply likewise against the defendant railroads and the intervening defendant railroads.

Order

Wherefore, on the basis of the foregoing,

It is hereby ordered, adjudged and decreed that the defendant Brotherhood of Locomotive Firemen and Enginemen, its officers, agents, employees and attorneys and all persons in active concert or participation with them, be, and they hereby are restrained and enjoined pending the determination of this action from

(a) Requiring or inducing or compelling the Southern Railway Company or the Atlantic Coast Line Railroad Company or any of the intervening defendant railroad companies to recognize or comply with the agreement between the Southeastern Carriers Conference Committee and the said Brotherhood, executed in Washington, D. C. on February 18, 1941, or with any other agreements or understandings between any of the said railroads and the said Brotherhood in so far as any such agreement or understanding requires any of the said railroads to discriminate against these plaintiffs or against other Negro firemen employed by said railroads by denying them their seniority rights to assignments hereafter made as firemen on steam locomotives or as helpers on Diesel locomotives because they are Negroes or because they are so-called "non-promotable" employees or because of any considerations other than seniority, efficiency, reliability or like considerations, and

(b) Requiring or inducing or insisting that any of the said railroads take any action with respect to the seniority rights to assignments hereafter made as firemen on steam locomotives or as helpers on Diesel locomotives by the said railroads which would alter practices and policies with respect to seniority rights to assignments as firemen on steam locomotives or as helpers on Diesel locomotives followed by such railroads prior to the enforcement of the said agreement of February 18, 1941, or of any other agreements or understandings which provide for the discrimination against Negro firemen in respect to seniority rights to job assignments.

It is further ordered, adjudged and decreed that the defendant railroad companies and the intervening defendant railroad companies,

Southern Railway Company,
Atlantic Coast Line Railroad Company,
State University Railroad Company,
The Cincinnati, New Orleans and Texas Pacific Railway Company,
The Alabama Great Southern Railroad Company,
Woodstock & Blocton Railway Company,
New Orleans and Northeastern Railroad Company,
New Orleans Terminal Company,
Georgia Southern and Florida Railway Company,
St. Johns River Terminal Company,
Harriman and Northeastern Railroad Company, and
Cincinnati, Burnside & Cumberland River Railway Company,

and each of them, their officers, agents, employees and attorneys, and all persons in active concert or participation with them, be and each of them is hereby restrained and enjoined pending the determination of this action from recognizing or complying with the agreement between the Southeastern Carriers' Conference Committee and the defendant Brotherhood, executed in Washington, D. C., on February 18, 1941, or with any other agreements or understandings between any of the said railroads and the said Brotherhood, in so far as any such agreement or understanding requires any of said railroad defendants or intervening railroad defendants to discriminate against the plaintiffs or against other Negro firemen employed by said railroads by denying them their seniority rights to assignments hereafter made as firemen on steam locomotives or as helpers on Diesel locomotives because they are Negroes or because they are so-called "non-promotable" employees or because of any considerations other than seniority, efficiency, reliability, or like considerations.

Plaintiffs shall give security in the sum of $1,000 for the payment of such costs or damages as may be incurred or suffered by defendants if they are found to have been

wrongfully enjoined or restrained by this order, such bond to be approved by the court or the clerk of the court.

This order is stayed until December 10, 1947, to enable the defendants to apply to the United States Court of Appeals of the District of Columbia for a stay pending appeal from this order.

——— ———, Justice, District Court of the United States for the District of Columbia.

Dated December 3, 1947.

(4766)

United States Court of Appeals

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 9716

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, APPELLANT

v.

LEROY GRAHAM, ET AL., APPELLEES

Special Appeal from the United States District Court for the District of Columbia

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Argued April 13, 1948 Decided October 26, 1948

Mr. Milton Kramer, with whom *Mr. Lester P. Schoene*, who entered an appearance, and *Messrs. Harold C. Heiss* and *Russell B. Day*, were on the brief, for appellant.

Mr. Joseph L. Rauh, Jr., with whom *Mr. Irving J. Levy*, who entered an appearance, and *Messrs. William W. Kramer* and *Henry Epstein*, were on the brief, for appellees Graham, *et al.*

Mr. Henry L. Walker for appellee Southern Railway Company. *Mr. Sidney S. Alderman* also entered an appearance for appellee Southern Railway Company.

Messrs. Robert R. Faulkner and *Thomas W. Davis* entered appearances for appellee Atlantic Coast Line Railway.

Before STEPHENS, C. J., and EDGERTON and CLARK, JJ.

STEPHENS, C. J.: This is a special appeal allowed by this court from an order of the United States District Court for the District of Columbia granting a preliminary injunction. The appellant, a defendant below, is the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, hereafter sometimes referred to as the Brotherhood. Other defendants were subordinate Lodge No. 7 (the "Potomac" Lodge) and Lodge No. 532 (the "National Capitol" Lodge) of the Brotherhood composed principally of members residing in the District of Columbia; Marvin M. McQuade, Recording Secretary and Financial Secretary of Lodge No. 7, and William E. Lacey, Recording Secretary of Lodge No. 532, residents of the District of Columbia; the Southern Railway Company, the Seaboard Air Line Railway Company, and the Atlantic Coast Line Railway Company, interstate carriers operating along the

eastern seaboard, hereafter referred to as the carriers. Other railroad companies intervened. Neither they nor the "other defendants" mentioned above are parties to this appeal. The appellees, plaintiffs below, are 21 Negro firemen employees of the carriers. Their complaint in the District Court charged: that the Brotherhood by virtue of its constitution and practices restricts its membership to white locomotive firemen and enginemen; that its members have constituted the majority of the craft or class of locomotive firemen on most of the interstate railroads of the United States, including the defendant carriers, and that in consequence the Brotherhood has, pursuant to the provisions of the Railway Labor Act, 45 U. S. C. § 151, *et seq.* (1946)[1], continuously acted as sole bargaining agent for the entire class of locomotive firemen, including Negro firemen; that as such sole bargaining agent the Brotherhood has negotiated agreements and arrangements with the carriers, including an agreement of February 18, 1941, between the Southeastern Carriers' Conference Committee and the Brotherhood, discriminating against colored firemen and depriving them of rights and job assignments to which their seniority entitled them; that pursuant to these agreements and arrangements seniority rights to favored job assignments have been denied the appellees and other Negro firemen. The appellees sued on their own behalf and on behalf of all others similarly situated. Their complaint expressly founded the action upon the Railway Labor Act and the Constitution of the United States. The complaint sought: a determination of the appellees' rights and the rights of others similarly situated; a permanent injunction against any further discriminatory practices; an order directing restoration of jobs from which appellees and other Negro firemen had been unlawfully displaced; a permanent injunction restraining the Brotherhood from purporting to act as representative of the appellees or as representative of the class or craft of locomotive firemen under the Railway Labor Act so long as it does not fairly represent all members thereof, including the Negro firemen; damages for loss of employment and wages by reason of the discriminatory practices; and a preliminary injunction pending final hearing and determination of the cause. The appellees supplemented their complaint by a motion for a preliminary injunction restraining further discrimination and loss of job assignments pending final determination of the action. The appellant Brotherhood moved to dismiss the action upon the grounds that venue was improperly chosen, that the Brotherhood was not properly served, and that other actions in which the subject matter and parties were the same as in the instant case were pending in other district courts. The trial court denied this motion and entered an order issuing the preliminary injunction prayed for. The present appeal is from that order. In addition to urging that the court erroneously denied the motion to dismiss, the Brotherhood asserts also on the appeal that the preliminary injunction was issued in defiance of the Norris-LaGuardia Act, 29 U. S. C. § 101, *et seq.* (1946), and that it was erroneously issued also in that it altered rather than preserved the status quo existing prior to the commencement of the suit. In the view we take it is necessary to rule only upon the question of the propriety of the venue of the

[1] It is provided in Section 152: ". . . Fourth. . . . The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. . . ."

action. Further facts relating to a determination of that question are stated below.

The venue statute applicable to the United States courts generally, 28 U. S. C. § 112 (1946), provides that "no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant . . . ."[2] An unincorporated association—the Brotherhood, as above stated, is such—is an "inhabitant" only of the district in which is located its principal place of business. It was so ruled in *Sperry Products* v. *Association of American Railroads*, 132 F. (2d) 408 (C. C. A. 2d 1942), where the meaning of the word inhabitant for determination of venue for the commencement of patent infringement suits under the provisions of 28 U. S. C. § 109 (1940), was in issue in respect of the defendant American Association of Railroads, an unincorporated association.[3] Recognizing that inhabitancy should be attributed to such an association "as though it were a single jural person and not an aggregate," the court in that case, speaking through Learned Hand, Circuit Judge, said:

> . . . Whether an individual is an "inhabitant" of any place other than his home we need not inquire; the word has no better defined outlines than "domicile", or "residence"; all we need say here is that it was used to indicate some more permanent attachment than that of "a regular and established place of business"; and in the case of individuals other ties than occupational were certainly included. In the case of a corporation we may assume that it can be an "inhabitant" only of the state of its incorporation, Neirbo Co. v. Bethlehem Shipbuilding Corporation, 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167, 128 A. L. R. 1437; but even so, that will not serve as a test if there be several judicial districts in that state. Since a corporation can have no other activities than occupational, we are forced to choose among these; and it seems to us that we can only choose that place where its principal activities take place: its principal place of business. If so, the same test must apply to an unincorporated association with the added limitation that as to it no state of incorporation exists to disturb the test in application. . . . [132 F. (2d) at 411]

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[2] 28 U. S. C. § 112 (1946) is rephrased in 28 U. S. C. § 1391 (b), effective September 1, 1948, as follows: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

The Reviser's Notes to § 1391 state: "Word 'reside' was substituted for 'whereof he is an inhabitant' for clarity inasmuch as 'inhabitant' and 'resident' are synonymous. (See Ex parte Shaw, 1892, 12 S. Ct. 935, 145 U. S. 444, 36 L. Ed. 768; Standard Stoker Co., Inc. v. Lower, D. C., 1931, 46 F. 2d 678; Edgewater Realty Co. v. Tennessee Coal, Iron & Railroad Co., D. C., 1943, 49 F. Supp. 807.) Reference to 'all plaintiffs' and 'all defendants' were [sic] substituted for references to 'the plaintiff' and 'the defendant,' in view of many decisions holding that the singular terms were used in a collective sense. (See Smith v. Lyon, 1890, 10 S. Ct. 303, 133 U. S. 315, 33 L. Ed. 635; Hoge v. Jamieson, 1897, 17 S. Ct. 596, 166 U. S. 395, 41 L. Ed. 1049; and Fetzer v. Livermore, D. C., 1926, 15 F. 2d 462.)"

We think that the rephrasing in 28 U. S. C. § 1391 (b) (1948) of 28 U. S. C. § 112 (1946) makes no substantive change in respect of venue of the United States courts generally, and since the decision of the trial court in the instant case was rendered and the briefs on appeal written in terms of the venue provision as phrased in Section 112, we refer in this opinion to that phrasing rather than to the phrasing of Section 1391 (b).

[3] Section 109 provides: "In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. . . ."

An affidavit filed in support of the Brotherhood's motion to dismiss stated that the principal place of business of the Brotherhood is Cleveland, Ohio, and the constitution of the Brotherhood which was made a part of the record of the hearing on the motion to dismiss so provides. No counter-affidavit was filed. It may therefore be taken as established—it is indeed apparently not in dispute—that the principal place of business of the brotherhood, and therefore its inhabitancy, is Cleveland, Ohio. It follows that if the Federal venue statute governs, the venue in the instant case was mischosen.

There is, however, a local statute, that is, one enacted by Congress under Article I, § 8, cl. 17, applicable to the District of Columbia alone, which provides that no action shall be brought in the United States District Court for the District of Columbia by original process against any person "who shall not be an inhabitant of, *or found within*, the District, except as otherwise specially provided." (Italics supplied) D. C. Code (1940) § 11-308. It is contended by the appellees that that statute may be looked to for support of the venue in the instant case and that it was satisfied on the facts, that is to say, that the Brotherhood may properly be said to be "found" within the District, by virtue of its having therein the office of its "national legislative representative." But we need not determine whether the Brotherhood is thus "found" within the District since, for the reasons set forth below, we think the Federal venue statute governs.

In *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), the Supreme Court held that the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia (now the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit) are constitutional courts of the United States ordained and established under Article III of the Constitution. This holding is predicated upon recognition that those courts are "courts of the United States, vested generally with the same jurisdiction as that possessed by the inferior federal courts located elsewhere in respect of the cases enumerated in § 2 of Art. III,"[4] which provides that "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, [and] the laws of the United States . . . ." The holding is based upon a recognition further that "the judicial power thus conferred is not and cannot be affected by the additional congressional legislation enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere. . . ."[5] It follows that legislation enacted by Congress applicable to the inferior Federal courts in the exercise of Article III power is not and cannot be affected by legislation enacted by Congress under Article I, § 8, cl. 17, and therefore that the Federal venue statute enacted by Congress for the guidance of the inferior Federal courts exercising judicial power under Article III is not and cannot be affected by a local venue statute enacted by Congress, applicable to the courts in the District of Columbia, under Article I, § 8, cl. 17. If the local statute, requiring for venue only that a

[4] 289 U. S. at 545.
[5] 289 U. S. at 546.

defendant be "found" within the District, is applied, in support of venue in the instant case, which requires the exercise of Article III power, the local statute does affect, indeed it nullifies, the Federal venue statute requiring inhabitancy for venue, the defendant Brotherhood not being an inhabitant of the District. Even in cases founded upon diversity jurisdiction only, a local statute does not affect the operation of a Federal venue statute. Thus in *Doyle* v. *Loring*, 107 F. (2d) 337 (C. C. A. 6th 1939), it was held that, as to proceedings in a United States district court, a statutory provision of the state of Tennessee considered by the Court of Appeals to be in effect a venue statute, was ineffectual to render nugatory the specific venue requirements of the general Federal venue statute, 28 U. S. C. § 112 (Supp. 1938). The court stated that "venue established by a Federal statute cannot be impaired or annulled by a State statute." (107 F. (2d) at 340) The local venue statute—enacted by Congress under Article I, § 8, cl. 17—relied upon by the appellees in the instant case, is, in its relation to the Federal venue statute, comparable to a state statute. In short, as applied to all cases which require the exercise by an inferior Federal court of the judicial power conferred by Article III, a general Federal venue statute is exclusive in its operation. It is not to be thought that Congress intended that a defendant sued in a case requiring the exercise of such power should have less protection in respect of venue when the suit is commenced in the United States District Court for the District of Columbia than he would have if the suit had been commenced in any other United States district court also exercising Article III power.

The appellees contend, however, that the instant suit may, as against the Brotherhood, be regarded as a class suit brought against the two local lodges of the Brotherhood and McQuade and Lacey as representatives within Rule 23 (a), Federal Rules of Civil Procedure, providing that "If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary . . . ." And the appellees assert that since the two local lodges and McQuade and Lacey are inhabitants of the District, the inhabitancy requirement of the Federal venue statute, 28 U. S. C. § 112 (1946), is satisfied. The appellees rely upon *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403 (C. C. A. 4th 1945). Therein an action against the same Brotherhood as was a defendant and is the appellant in the instant case, to restrain it and the Norfolk Southern Railway Company from enforcing, among others, the same allegedly discriminatory collective bargaining agreement as is involved in the instant case, was held to be sustainable as a class action by virtue of its having been brought against a local lodge of the Brotherhood and one Munden, the chairman of that lodge, who were sued as defendants and served. But the action was sustained as a class suit because the Court of Appeals was of the view that as a matter of fact the subordinate lodge and the individual sued and served were fairly representative of the membership of the Brotherhood. It said: "It cannot be contended with any show of

reason that Munden and the subordinate lodge, who were admittedly served, were not fairly representative of the membership of the brotherhood or that service upon them would not give adequate notice to the class sued to come in and defend . . . ." (148 F. (2d) at 406) This view of the Court of Appeals in the *Tunstall* case was warranted because the record in that case discloses that members of the local lodge which was sued and served and the chairman sued and served were employees of the Norfolk Southern Railway Company which was itself a party to the allegedly discriminatory collective bargaining agreements. They, therefore, had an interest in the outcome of the suit co-extensive with that of the Brotherhood itself. They were among the employees concerning whom the agreements were made.* But in the instant case, although it is alleged in the complaint that the two local lodges and McQuade and Lacey are truly representative of the Brotherhood and that they are sued as representatives, there is no finding to that effect, and on the record there is no basis for such a finding. It is not alleged in the complaint that the members of the local lodges were employees of the defendant carriers; and the testimony of Lacey, Recording Secretary of Lodge No. 532, shows that the members of that lodge were not such employees but were on the contrary employees of the Washington Terminal Company and were therefore not affected by the allegedly discriminatory collective bargaining agreement which was the subject of the instant action. It therefore does not appear in the instant case that the two local lodges and McQuade and Lacey had an interest in the outcome of the suit which was co-extensive with that of the Brotherhood. This is an essential element of a true class suit under Rule 23 (a), Federal Rules of Civil Procedure. See MOORE'S FEDERAL PRACTICE (1938 ed.) § 23.03, pp. 2232-2233. The author there states that the "representative must have an interest, which is co-extensive and wholly compatible with the interests of those whom he would represent." The requirement of Rule 23 (a) that the class representatives sued must be such "as will fairly insure the adequate representation of all" is but a reflection of the requirements of due process. *Cf. Hansberry* v. *Lee*, 311 U. S. 32 (1940).

It follows from the foregoing that, in view of the law as it stood at the time of the trial court's action, the motion of the appellant Brotherhood for dismissal of the instant suit for lack of proper venue should have been granted and therefore that the order issuing the preliminary injunction should not have been entered. But an addition to the Judicial Code, 28 U. S. C. § 1406 (a), effective September

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* An affidavit of Carl J. Geff, assistant president of the Brotherhood, which was filed in support of the Brotherhood's motion to dismiss in the *Tunstall* case, contained the following statement: "Affiant further says that W. M. Munden, one of the named defendants in this cause, is a local chairman of one of such local lodges, to-wit, Ocean Lodge No. 76, which has about 115 members; that said W. M. Munden is employed by the Norfolk Southern Railroad and is local chairman (which means chairman of the local grievance committee) of said local lodge for the Norfolk Southern Railroad. That said W. M. Munden is compensated for his services by said local Lodge No. 76 only, from funds collected from the members of said lodge *employed on the Norfolk Southern Railroad*. That the duties of said W. M. Munden are to represent only the Norfolk Southern members of said lodge in the handling of grievances with local officials of the Norfolk Southern Railroad, and with no other railroad officials whatever, and that his duties are limited to said business and affairs of the Norfolk Southern members of said local Lodge No. 76." (Italics supplied)

1, 1948, provides that "The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought." Except where vested interests have intervened an appellate court must decide a case according to the law as it exists, whether in statutory form or in the form of judicial decision, at the time of its decision rather than according to the law as it existed at the time of the decision below. *Ruppert* v. *Ruppert*, 77 U. S. App. D. C. 65, 134 F. (2d) 497 (1942). Accordingly the ruling of the trial court that venue was properly laid in the District of Columbia is held erroneous and the order issuing the preliminary injunction is reversed and the case remanded to the trial court and that court is directed to transfer the case to the northern district of Ohio in which is situated the city of Cleveland wherein, as above pointed out, the Brotherhood has its inhabitancy.

Reversed and remanded.

[fol. 80] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 26, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1948

No. 9716

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, Appellant,

vs.

LEROY GRAHAM, et al., Appellees

Special Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia).

Before: Stephens, C. J., and Edgerton and Clark, JJ.

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed, with costs, and that the case be, and it is hereby, remanded to the said District Court with directions to transfer the case to the District Court for the Northern District of Ohio.

Per Chief Judge Stephens.

Dated October 26, 1948.

[fol. 81] Copy

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1947

No. 9716

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, Appellant,

v.

LEROY GRAHAM, et al., Appellees

Before: Groner, C. J., Stephens and Clark, JJ.

Order

This cause coming on this day for hearing on a preliminary transcript of record and on the petition of the Brotherhood of Locomotive Firemen and Engineers for stay of the preliminary injunction of the District Court herein, and it being agreed by all of counsel that said petition of the Brotherhood shall be treated as a petition for allowance of special appeal and for an order to maintain the status quo pending decision thereon,

It is Ordered by the Court that the injunction order of the District Court in this case be, and is hereby, stayed pending final action on the petition for special appeal.

The petitioner, Brotherhood, is allowed 3 days to file a statement of points on which it intends to rely and brief in support thereof. The respondents, including the railroads, are allowed 5 days thereafter within which to file answers or objections thereto.

Per Curiam.

Dated December 9, 1947.

[fol. 82] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jan. 5, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1948

No. 9716

District Court No. —. Civil Action 4330-47

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, Petitioner,

v.

LEROY GRAHAM, et al., Respondents

Before: Stephens, Edgerton and Clark, JJ.

Order

On consideration of the petition for allowance of a special appeal from the order of Mr. Justice Holtzoff entered in this cause on December 3, 1947, in the District Court of the United States for the District of Columbia, and of petitioner's supplemental brief in support thereof, and of respondents' objections thereto, It is

Ordered by the Court that a special appeal from said order be, and it is hereby, allowed and that the stay of the injunction heretofore granted by this court be, and it is hereby, continued in effect pending final disposition of the appeal or until further order of this court in this case.

Per Curiam.

Dated: January 5, 1948.

[fol. 83] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Nov. 5, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9716

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, Appellant,

v.

LEROY GRAHAM, et al., Appellees

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appellant's Appendix.
2. Opinion.
3. Judgment.
4. Order of December 9, 1947, staying injunction order pending action on special appeal.
5. Order of January 5, 1948, allowing special appeal.
6. This designation.
7. Clerk's certificate.

Joseph L. Rauh, Jr., Attorney for Appellees.

Rauh and Levy, 1631 K Street, N. W., Washington 6, D. C.

Certificate of Service

I certify that I served copies of the foregoing Designation of Record upon Messrs. Milton Kramer, 1625 K Street, N. W., Attorney for Brotherhood of Locomotive Firemen and Enginemen; Henry L. Walker, 15th & K Streets, N. W., Attorney for Southern Railway Co., and Robert R. Faulkner, Shoreham Building, 15th and H Streets, N. W., Attorney for Atlantic Coast Line Railway, by mailing postage prepaid, to each of them this day to the above addresses

William W. Kramer.

Dated: November 5, 1948.

[fol. 84] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 83, both inclusive, constitute a true copy of the appendix to appellant's brief and the proceedings of the said Court of Appeals as designated by counsel for appellant in the case of: Brotherhood of Locomotive Firemen and Enginemen, Appellant, vs. Leroy Graham, et al., Appellees, No. 9716, October Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this thirtieth day of November, A. D. 1948.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is assigned for argument on Monday, October 10, 1949.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~---~~ 16

LEROY GRAHAM, ET AL.,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH L. RAUH, JR.,
IRVING J. LEVY,
HENRY EPSTEIN,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

LEROY GRAHAM, ET AL.,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners, 21 negro firemen on the three major southeastern railroads, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below

The opinion of the district court granting petitioners a preliminary injunction is reported in 74 F. Supp. 663. The opinion of the court of appeals (R. 73) has not yet been reported.

Jurisdiction

The judgment of the court of appeals was entered on October 26, 1948 (R. 80). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (now 28 U. S. C. § 1254).

Questions Presented

1. Whether the District Court for the District of Columbia has the dual jurisdiction of both a federal and a state court so that the "local" venue statute of the District of Columbia may be applied to a suit brought under the Railway Labor Act, which, in any of the States, could be brought in either the federal or the state court.

2. Whether local lodges of the respondent Brotherhood of Firemen and Enginemen and the secretaries of these local lodges "fairly insure the adequate representation" of the entire class of membership of the respondent Brotherhood under Rule 23(a) of the Federal Rules of Civil Procedure for purposes of supporting venue in a class action against the Brotherhood, as was held by the Court of Appeals for the Fourth Circuit in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403.

3. Whether Section 301(c) of the Labor-Management Relations Act, 1947, providing that a "labor organization" may be sued "in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members", applies to all labor organizations or whether organizations of railway employees are excluded therefrom.

Statutes Involved

The pertinent provisions of the statutes involved in this case are set out in the Appendix.

Statement

1. *Institution of Suit:* On October 27, 1947, petitioners, 21 negro firemen on the three major southeastern railroads, brought this suit to vindicate their rights under the Railway Labor Act (48 Stat. 1185; 45 U. S. C. §§ 151 et seq.) and the Constitution of the United States. Petitioners instituted the action on their own behalf and on behalf of all other negro firemen similarly situated against the railroads, the respondent Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the Brotherhood), the two District of Columbia Lodges of the Brotherhood and the secretaries of these two lodges (R. 1-4).

Petitioners' cause of action is based upon the decisions of this Court in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210. The complaint alleged that the Brotherhood, as sole bargaining agent of the entire class of locomotive firemen, including these plaintiffs and other negro firemen, had negotiated agreements and arrangements with the railroads which discriminate against colored firemen and deprive them of the rights and job assignments to which their seniority entitles them (R. 6-9). The complaint further alleged that, notwithstanding the determination by this Court that this discrimination was illegal and violative of the Railway Labor Act, respondent Brotherhood and the southeastern carriers continued to discriminate against petitioners and their class, resulting in the unlawful displacement and demotion of many negro firemen and their replacement by white firemen having less seniority (R. 9, 14).

The complaint further alleged that the Brotherhood maintains offices in the District of Columbia, acts as bargaining representative within the District and is otherwise doing business regularly within the District (R. 3); that two sub-

ordinate lodges of the Brotherhood maintain offices and secretaries within the District and are composed principally of members of the Brotherhood who reside in the District (R. 3-4); and that "defendants subordinate Lodges . . . are all the lodges of defendant Brotherhood within the District of Columbia and are truly and fairly representatives of the other subordinate lodges of Brotherhood and of Brotherhood itself, and the interest of all the members, subordinate lodges and of the Brotherhood will be adequately represented in this action by the defendants. The defendants subordinate Lodges and the defendants McQuade and Lacey [the secretaries] are sued as representatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure" (R. 4).

Petitioners' complaint sought a determination of their rights and those of their class, a permanent injunction against any further discriminatory practices, an order directing restoration of jobs unlawfully taken away, damages for loss of employment and wages by reason of the discriminatory practices, and a preliminary injunction pending final hearing and determination of the action (R. 15-16).

2. *Motion for Preliminary Injunction:* At the time of filing the complaint on October 27, 1947, petitioners moved the District Court for a preliminary injunction to prevent further discrimination and loss of job assignments pending the final determination of the action (R. 22-23). In support of this motion, petitioners filed a detailed affidavit by Benjamin F. McLaurin, Field Organizer of the Provisional Committee to Organize Colored Locomotive Firemen, who had been in close and active association with these colored firemen and was fully familiar with the facts and practices complained of (R. 23-24). McLaurin's affidavit stated that in 1944 the Supreme Court of the United States

in the *Steele* and *Tunstall* cases held the discriminatory practices of the Brotherhood and the railroads involved to be violative of the Railway Labor Act (R. 29); that nevertheless the Brotherhood ignored these decisions and continued to carry out the provisions of the unlawful and discriminatory agreements and arrangements (R. 30); that the displacement of steam power by Diesel locomotives is growing and negro firemen are being displaced at an ever increasing rate; and that unless these discriminatory practices are stopped, the complete elimination of negroes from their time-honored jobs as locomotive firemen in the near future is inevitable (R. 30).

3. *Action of Brotherhood:* The Brotherhood filed no affidavit or other evidence challenging any of the facts set forth in the bill of complaint or the McLaurin affidavit. Instead, it filed a Motion to Dismiss or to Stay further Proceedings on grounds, among others, of improper venue and failure of service (R. 39-40).

4. *The Position of the United States Government:* The United States moved the District Court for leave to file a memorandum as *amicus curiae*. Upon the granting of this motion, the Attorney General filed a memorandum in support of petitioners' preliminary injunction. The Government stated in part as follows (p. 3):

> ". . . we submit that there is a public as well as a private interest in this litigation which requires that the defendants' unlawful discriminatory conduct be restrained at the earliest moment. Almost three years have elapsed since the Supreme Court held that the Brotherhood defendant was acting in violation of the federal statute, and that the discrimination based upon race was 'invidious' as well as 'illegal.' The Brotherhood, and the railroads which have cooperated with it —whether willingly or not—have completely ignored and disregarded the Supreme Court's ruling. They

have continued to go their own way without paying any attention to the law of the land as it has been applied to the very contract here in issue by the highest tribunal."

5. *Hearings before the District Court:* On November 10th and 25th the district court took testimony and heard full and complete arguments on the Brotherhood's motion to dismiss and on petitioners' motion for preliminary injunction. The district court gave the Brotherhood every opportunity to challenge the facts in the complaint and the McLaurin affidavit, but the Brotherhood refused to avail itself of the opportunity.

6. *Judgment of the District Court:* The district court denied the Brotherhood's defense of improper venue (R. 50-51) on the authority of *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403. Thereafter the district court granted petitioners' motion for a preliminary injunction against the Brotherhood (R. 62-66) stating that there was "no doubtful question of law" since "we already have rulings by the Supreme Court of the United States and by the Circuit Court of Appeals for the Fourth Circuit condemning as illegal the specific practices set forth in the complaint" (R. 65). On December 3, 1947, the district court entered its findings of fact, conclusions of law and preliminary injunction restraining the Brotherhood and the railroads from discriminating against petitioners and other negro firemen by denying them their seniority rights on job assignments made after the date of the order (R. 70-72).

7. *Proceedings in the Court of Appeals:* The railroads did not appeal from the preliminary injunction but the Brotherhood petitioned the court below for the allowance of a special appeal under D. C. Code, Section 17-101, and a stay of the preliminary injunction. On December 9, 1947,

the court below ordered that the preliminary injunction granted by the district court be stayed pending final action on the petition for special appeal. On January 5, 1948, the court entered an order allowing the special appeal and continuing the stay of the preliminary injunction pending final disposition of the appeal. Argument was heard on April 13, 1948 and on October 26, 1948, the court entered its opinion and judgment holding that the venue in the instant case was "mischosen." The court rejected petitioners' contention that the District Court for the District of Columbia has the dual jurisdiction of both federal and state courts so that the "local" venue statute of the District of Columbia may be applied to a case under the Railway Labor Act which, in any of the States, could be brought in either the federal or the state court. The court reversed the district court's holding that venue was properly laid in the District of Columbia considering the case as a class suit, a holding fully supported by the decision of the United States Court of Appeals for the Fourth Circuit in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403. Thirdly, the Court rejected, *sub silentio*, petitioners' contention that venue was properly laid in the District of Columbia under Section 301(c) of the Labor-Management Relations Act, 1947, which allows suit against a labor organization in any district in which agents of the union "are engaged in representing or acting for employee members." Rejecting all three of these contentions, any one of which would sustain venue in the District Court, the court below, after having stayed the preliminary injunction for over 10½ months, directed the district court to transfer the case to the Northern District of Ohio.[1]

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[1] The statute under which the court below purported to act provides for the transfer of a case of mischosen venue "to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). The court below made no finding that this case could have been brought in the North-

Specification of Errors to Be Urged

The court below erred:

1) In holding that the "local" venue statute of the District of Columbia is inapplicable to a suit under the Railway Labor Act.

2) In holding that local lodges of the Brotherhood and their secretaries will not "fairly insure the adequate representation" of the entire class of the membership of the Brotherhood under Rule 23(a) of the Federal Rules of Civil Procedure.

3) In holding, without discussion, that Section 301(c) of the Labor-Management Relations Act, 1947, does not support venue in the District Court for the District of Columbia.

4) In directing the district court to transfer the case to the Northern District of Ohio without anything in the record to indicate that the suit could have been brought in that district as required by 28 U.S.C. § 1406(a).

Reasons for Granting the Writ

The decision of the court below is clearly erroneous. More significant for purposes of this petition, however, are the important and extremely damaging results that will inevitably flow from this decision if it is allowed to stand. In the first place, the present forum was carefully chosen because the Brotherhood and the major southeastern railroads all do business in the District of Columbia; if this forum is unavailable, it is not known whether any other forum is available to vindicate the rights of the colored firemen

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ern District of Ohio. As far as appears from the record and as far as petitioners are informed, the railroads involved do no business in the Northern District of Ohio. The Brotherhood has continuously maintained that these railroads are indispensable parties to any suit.

declared by this Court four years ago and still brazenly ignored by the Brotherhood and the railroads. Certainly the forum directed by the court below, the Northern District of Ohio, is wholly inadequate since the railroads are not doing business there. In the second place, the decision of the court below discriminates against, and curtails the rights of, litigants in the District of Columbia courts; they are denied the "local" or "state" forum available to litigants in suits brought in every State of the Union in cases of concurrent federal and state jurisdiction. Finally, the decision of the court below means that in order to invoke the "local" venue statute in any case in the District of Columbia, a plaintiff will have to show that if he had brought suit in another jurisdiction, he could *not* have brought the suit in a federal court. In other words, federal jurisdiction will have to be negatived every time an effort is made to use the "local" venue statute in the District of Columbia. Neither the Congress nor this Court ever intended such an unworkable result.

1. THE DECISION OF THE COURT OF APPEALS HOLDING THE "LOCAL" VENUE STATUTE OF THE DISTRICT OF COLUMBIA INAPPLICABLE TO THIS CASE IS PLAINLY ERRONEOUS AND CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

Petitioners contended before the district court and before the court of appeals that venue is properly laid against the Brotherhood as an entity in the District of Columbia under the "local" venue statute of the District of Columbia (Section 11-306,[2] D. C. Code) providing for suit against a de-

[2] Section 11-306 provides that the District Court "shall have cognizance . . . of all cases in law and equity between parties, both or either of which shall be resident or be found within said district. . . ." The opinion of the court below strangely enough discusses only Section 11-308, D. C. Code, although Section 306 is plainly applicable. Section 308 of the same title reinforces the express provisions of Section 306 conferring jurisdiction under the facts as alleged in the complaint.

fendant "found" in the District. There cannot be any serious question that the Brotherhood is "doing business" in the District of Columbia[3] and is thus "found" within the District under the "local" venue statute. See *International Shoe Co.* v. *Washington*, 326 U. S. 310; *Frene* v. *Louisville Cement Co.*, 134 F. (2d) 511, 77 App. D. C. 129. The sole question, therefore, is whether this "local" venue statute applies to petitioners' suit.

Petitioners' cause of action in this case, although arising under the Railway Labor Act, is entertainable not only by federal district courts but by state courts as well. This concurrent jurisdiction of both state and federal courts of petitioners' cause of action is clearly indicated by *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, which arose through the state courts, and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, which arose through the federal courts. Since petitioners' action could have been brought in a state court in another jurisdiction, it seems clear that the "local" venue statute applies when the action is brought in the courts of the District of Columbia.

Exactly why the court below injected the issue of Article III versus Article I power into this case is not clear. Congress, acting under the Commerce Clause (see *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 553), passed the Railway Labor Act and gave petitioners rights enforce-

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[3] The court below did not pass upon the question whether the Brotherhood was "doing business" within the District of Columbia, but it is not believed that this can be seriously challenged by the Brotherhood. Two of its subordinate lodges (these were joined as defendants) are located in the District of Columbia and each of the lodges has a substantial number of dues-paying members (R. 4, 52-59). The Brotherhood moreover maintains a national office in the District in which one of its vice-presidents and a clerical assistant are permanently stationed and through which its national legislative activities are carried out (R. 40). In fact, the very Southeastern Carriers Agreement under attack in this case was executed in the District of Columbia (R. 17-19).

able in either federal or state courts. Petitioners have chosen the District of Columbia courts as the forum in which to vindicate these rights because both the railroads and the respondent Brotherhood are doing business in the District. The District of Columbia venue statute is applicable by its own terms to this action and the statute is a valid exercise of Congressional power whether enacted under Article I, Section 8, Clause 17, or under Article III. The court below has artificially injected a question of Article III versus Article I power into a case where it has no relevance. Because of the importance of the question involved and because the court below has injected this Article III versus Article I issue into the case, we have deemed it necessary to deal with the arguments made by the court below on this issue.

* * * * * * *

The dual jurisdiction of the courts of the District of Columbia as both federal and state courts has been settled by authoritative decisions of this Court. Thus, in *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 442, 443, a unanimous Supreme Court, speaking through Mr. Chief Justice Taft, stated:

> "This (cl. 17, §8, Art. I) means that as to the District Congress possesses not only the power which belongs to it in respect of territory within a State but the power of the State as well. In other words, it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a state may confer on her courts. *Kendall* v. *United States*, 12 Pet. 524, 619. * * * Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring, jurisdiction on its courts."

See, to the same effect, *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 700.

In *O'Donoghue* v. *United States*, 289 U. S. 516, this Court, after quoting with approval the above language from the *Keller* case as to the dual jurisdiction of the courts of the District of Columbia, went on to state that the jurisdiction conferred upon the courts of the District of Columbia under Article III of the Constitution and the jurisdiction conferred under Article I, Section 8, Clause 17, "are not incompatible." 289 U. S. at 546. What the Court held in the *O'Donoghue* case was that salaries of the judges in the higher courts of the District of Columbia could not be reduced because these courts had been established under Article III, but the Court made it equally plain in its decision that these District of Columbia courts exercised the dual jurisdiction of federal and state courts.

This principle has been stated with extreme clarity by the court below in the earlier and apparently overlooked case of *King* v. *Wall and Beaver Street Corp.*, 79 U. S. App. D. C. 234, 145 F. (2d) 377, 380 (1944). There the court, speaking through Chief Justice Groner, had pointed out:

> "The District Court of the United States for the District of Columbia, as we have often said, is clothed with a two-fold jurisdiction. It has all the ordinary and usual jurisdiction of a State court in respect to matters which in a State would be exercised by a State court, and this it attains by Acts of Congress under the provisions of Section 8 of Article I of the Constitution. It likewise has all of the jurisdiction and powers of United States district courts elsewhere, and this jurisdiction is, in turn, conferred by Acts of Congress under Article III of the Constitution, *O'Donoghue* v. *United States*, 289 U. S. 516."

In the *King* case, plaintiffs sought to maintain an action which failed to meet the requirements of the federal venue

statute, and was equally improper under the "local" venue statute. Plaintiffs tried to lay venue in the District of Columbia by using part of each statute. The court of appeals correctly held that venue could not be established by intermingling parts of the two venue provisions, but it made clear that there would be jurisdiction if plaintiffs could meet the requirements of either the federal or the "local" venue statute.

We respectfully submit that, in the light of this dual or two-fold jurisdiction of the courts of the District of Columbia, the reasoning in the opinion of the court below is wholly incorrect and has led the court to its patently erroneous conclusion.

(1) The court below seems to have based its decision on the assumption that if the "local" venue statute were applied to this case, it would *affect* or *nullify* the federal venue statute. This overlooks the dual or two-fold jurisdiction of the courts of the District of Columbia so clearly defined in the cases referred to above. The application of the "local" venue statute to this cause of action, which could have been brought in either a federal or state court, no more *affects* or *nullifies* the federal venue statute than did the application of the Alabama venue statute when the *Steele* case was brought in the state court. Certainly one cannot say that the federal venue statute is *affected* or *nullified* when a state venue statute is applied and a suit is entertained in the state court simply because the suit might also have been brought in a federal court in a situation in which it has concurrent jurisdiction. No more can it be said that the federal venue statute is *affected* or *nullified* when the "local" venue statute of the District of Columbia is applied to a suit in the District of Columbia courts simply because the federal venue statute might have been

applied as a result of the concurrent jurisdiction of federal courts of the cause of action.

This erroneous assumption in the opinion below is illustrated by the court's reliance on *Doyle* v. *Loring*, 107 F. (2d) 337 (C. C. A. 6th 1939). That was a suit in the Federal district court in Tennessee by non-resident heirs against a non-resident administratrix for a discovery of the deceased's assets. The suit was brought in the federal court on the basis of diversity of jurisdiction. Venue did not properly lie in the Federal district court in Tennessee because neither the plaintiff nor the defendant were residents of the district. The plaintiff in the federal court tried to rely upon the state venue statute, and of course, the court held that the state venue statute could not be applied in the federal court. This Tennessee case is the exact opposite of the case at bar. Applying the decision below in the instant case to the situation in the Tennessee case, it would come down to this: if the plaintiff there had brought his suit for discovery in the Tennessee state court, the state judge should have refused to entertain the action because there was concurrent jurisdiction in the federal courts and the state judge would be *affecting* or *nullifying* the federal venue statute by applying the local state venue statute to the case before him. Merely to state this proposition illustrates the complete fallacy in the court's reasoning in the instant case.

What may have confused the court below is the difference between "exclusive" and "concurrent" jurisdiction of federal courts. If the case at bar were one of "exclusive" federal jurisdiction—admiralty, maritime, patent, copyright, etc. (28 U. S. C. §§ 1333, 1338)—the case could only be brought in a federal court and therefore, it might be argued that the federal venue statute alone would apply in a suit in the District of Columbia. But where as here the case is one of "concurrent" jurisdiction which can be brought

in either federal or state courts,[4] when it is brought in a state court, the local state venue statute applies and when it is brought in the courts of the District of Columbia the "local" or "state" venue statute is equally applicable.

(2) The second erroneous assumption in the opinion below lies in the suggestion that the present case "*requires the exercise of Article III power.*" The present case no more requires the exercise of Article III power because brought in the courts of the District of Columbia than it would if brought in a state court. The present case does require the exercise of *judicial* power and since it requires the exercise of judicial power, it may be reviewed by the Supreme Court, which, of course, it could not be if it required only the exercise of executive, legislative or administrative power. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428. But the exercise of *judicial* power is quite different from the exercise of *Article III power.*

This difference between Article III power and judicial power is made clear in *Williams* v. *United States*, 289 U. S. 553, 565-566, holding that the Court of Claims is not an Article III court for purposes of protecting the judges' salaries against Congressional action. Nevertheless, this Court there stated that the Court of Claims and other legislative courts "possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution." This Court made this same distinction between judicial power and legislative, executive or administrative power in defining the nature of the courts of the District of Columbia in the *O'Donoghue* case when it stated that Congress "has conferred upon these

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[4] It is elementary that state courts have concurrent jurisdiction with federal courts over many kinds of actions which arise under federal statutes. See *Second Employers' Liability Cases*, 223 U. S. 1.

[D.C.] courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters . . ." (289 U. S. at 545).

The "local" venue statute is based on Article I, Section 8, Clause 17 of the Constitution[5] and makes it possible for the district court and the court of appeals to entertain judicial actions that would ordinarily be heard in state courts elsewhere than in the District of Columbia. The present case was brought in the District Court for the District of Columbia and was thus properly governed by the venue statute of the District of Columbia.

(3) The court below stated in its opinion that "it is not to be thought that Congress intended that a defendant sued in a case requiring the exercise of such power [Article III] should have less protection in respect of venue when the suit is commenced in the District Court of the United States for the District of Columbia than he would have if the suit had been commenced in any other United States district court also exercising Article III power." The concept of "protection" of the defendant is a wholly gratuitous one as applied to this case, since this a suit which could have been brought in a state court. If plaintiffs had sued the Brotherhood in a state court, the local state venue statute would have applied. How can it be said that there is less protection of defendant when plaintiffs sue in the courts of the District of Columbia and rely upon the "local" venue statute?

What the decision below really does is to curtail the "protection" given to litigants in the District of Columbia courts by denying them the "state" forum which they

[5] This is not to suggest that the "local" venue statute could not have been enacted as a proper exercise of Article III power. We are simply assuming, since the section is part of the District of Columbia Code, that it was enacted under Article I, Section 8, Clause 17.

would have in any of the States in cases of concurrent jurisdiction. The serious consequences of such a restriction, if permitted to stand, can be illustrated by the circumstances of the litigation at bar. The court below directed the district court to transfer the case to the Northern District of Ohio pursuant to 28 U. S. C. § 1406(a). Assuming 28 U. S. C. § 1406(a) has any application to a suit pending at the time of enactment, the section expressly limits transfer of a suit to a district "in which it could have been brought." The court below made no finding that this action could have been brought in the Northern District of Ohio nor could it have done so in this case. If the Brotherhood can only be sued in Ohio where it is an inhabitant, it may not be suable at all to enjoin the violation of the Railway Labor Act. The Brotherhood has asserted that the railroads are indispensable parties defendant which may well be so as the district court assumed. The complaint alleges that the defendant railroads operate along the eastern seaboard (R. 2) and they are in all probability not doing business in Ohio so that neither the Federal nor State courts of Ohio would have jurisdiction over this cause of action.

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The Court's attention is invited to the pending case of *National Mutual Insurance Company* v. *Tidewater Transfer Company*, No. 29, October Term, 1948. In its brief *amicus curiae*, the United States contends that Article I, Section 8, Clause 17 of the Constitution authorizes Congress to allow suits by District of Columbia citizens against citizens of any state in the federal district courts. This contention goes far beyond petitioners' contention here. In the *National Mutual* case the United States is arguing that Article I, Section 8, Clause 17 authorizes Congress to add non-Article III judicial power to federal courts outside the

District of Columbia. Here petitioners simply contend that Article I, Section 8, Clause 17 authorizes Congress to add non-Article III judicial power to the courts of the District of Columbia. The proposition is self-evident, is supported by numerous decisions of this Court, and is belabored here only because of the gross error of the court below.

2. THE DECISION OF THE COURT OF APPEALS THAT VENUE IS NOT PROPERLY LAID IN THE DISTRICT COURT CONSIDERING THE CASE AS A CLASS SUIT IS ERRONEOUS AND CONFLICTS WITH THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IN *TUNSTALL* v. *BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN*, 148 F. (2d) 403.

There were other adequate bases to support the venue of the district court. Petitioners contended before the district court and before the court of appeals that venue was properly laid in the District of Columbia because the suit was brought as a class suit as well as a suit against the Brotherhood in its common name. The two District of Columbia lodges of the Brotherhood and the two secretaries of those lodges were joined as defendants along with the Brotherhood. Since these two local lodges and their two secretaries are inhabitants of the District, the inhabitancy requirement of the Federal venue statute, 28 U. S. C. § 112 (now 28 U. S. C. § 1391) is fully satisfied.

Paragraph 12 of the bill of complaint (R. 4) is clear and explicit:

> "12. Upon information and belief, defendants subordinate Lodges No. 7 and No. 532 are all the lodges of defendant Brotherhood within the District of Columbia and are truly and fairly representatives of the other subordinate lodges of Brotherhood and of Brotherhood itself, and the interest of all the members, subordinate lodges and of the Brotherhood will be adequately represented in this action by the defendants. The defendants subordinate Lodges and the defendants McQuade and Lacey [the secretaries] are sued as repre-

sentatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure."

The above allegation brings this case squarely within the *Tunstall* case, *supra*, upon which the district court relied in upholding venue. The allegations in the *Tunstall* case, as set forth in Judge Parker's opinion, are identical with the allegations in the case at bar.

Despite this, the court below held that the two local lodges and their secretaries did not "insure the adequate representation of all" the class under Rule 23(a) of the Federal Rules of Civil Procedure, since these lodges and officers did not engage in the discriminatory agreements and arrangements charged against the Brotherhood. The court's distinction of the *Tunstall* case boils down to this: The District of Columbia lodges have no discriminatory agreements with the railroads; the lodges in the *Tunstall* case had such agreements; therefore, the lodges in the *Tunstall* case were representative of the entire class, whereas, the District lodges are not. But the question whether the members of the class sued will fairly represent the interest of the absent members in the litigation does not turn on whether those joined have participated as fully as the others in the acts complained of. The question whether the defendants are truly representative for purposes of representing a class in a suit is not determined by technical niceties. The true test is whether the interests of the named defendants are sufficiently similar to those of the other members of the class that the defense will receive proper attention. This is what *Hansberry* v. *Lee* 311 U. S. 32 teaches.

The local lodges and secretaries have an identical interest with the Brotherhood in the preservation of the Brotherhood's treasury to which they contribute and upon which

they rely in time of need. They have a common interest in the successful functioning of the organization and its policies. They have common lawyers whom the institution of this action "brought in fighting". *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, supra.* The lodges and officers joined as defendants have no interests which are "antagonistic to those whom. . . [they] would represent." Moore's Federal Practice, p. 2232. Just as in the *Tunstall* case, the local lodges and secretaries will fairly represent the entire class. See *Hansberry* v. *Lee*, 311 U. S. 32, 41-43.

The decision below, if permitted to stand, would seriously curtail the utility of the device of a class action which Rule 23(a) was designed to afford.[6]

3. THE DECISION OF THE COURT OF APPEALS OVERRULING SUB SILENTIO PETITIONERS' CONTENTION THAT SECTION 301(c) OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, APPLIES TO THE INSTANT CASE IS ERRONEOUS AND DECIDES AN IMPORTANT AND NOVEL QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Section 301(c) of the Labor-Management Relations Act, 1947, provides as follows:

> "For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

It would hardly seem controvertible that the lodges and their officers "are engaged in representing or acting for

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[6] Moore's Federal Practice refers to an action "by or against representatives of an unincorporated association" as "a good illustration" of the "true class suit" (p. 2236).

employee members" of the Brotherhood in the District of Columbia. In addition, the Brotherhood maintains an office at 10 Independence Avenue, S. W., Washington, D. C., which is operated by Mr. Jonas A. McBride, a Vice President and National Legislative Representative of the Brotherhood (R. 40).

Despite the clear language of this provision, the Brotherhood contended in the court below that Section 301(c) is inapplicable to any labor organization subject to the Railway Labor Act. In support of this contention, the Brotherhood pointed to Section 501(3)—a section of a later Title of the Labor-Management Relations Act—providing that the term labor organization "shall have the same meaning as when used in the National Labor Relations Act as amended by this Act."[7] This same contention was made by this same Brotherhood in *United States* v. *Brotherhood of Locomotive Engineers et al.*, 79 F. Supp. 485, cert. den. Nov. 15, 1948, No. 277, October Term, 1948. That was a suit brought by the United States in the District Court for the District of Columbia against several railroad unions, including the Brotherhood of Locomotive Firemen and Enginemen, to restrain a strike called by the unions. The District Court accepted the Government's

[7] Section 2(5) of the Labor-Management Act defines the term "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Since Section 2(2) defines the term "employer" as excluding "any person subject to the Railway Labor Act," it is argued that the term "labor organization" excludes organizations of employees dealing with employers subject to the Railway Labor Act. It is equally arguable, since the definition of "labor organization" makes no express exclusion of labor organizations subject to the Railway Labor Act, that Congress did not intend any such blanket exclusion simply by using the word "employer" in the definition of "labor organization." And the surrounding circumstances make perfectly clear that the latter was what Congress intended.

argument that railroad labor organizations were not excepted from Section 301(c) and held that venue was properly laid in the District Court for the District of Columbia.

There is good reason for believing that the Congress did not intend by the general language of Section 501(3) in Title V to exclude railroad labor organizations from the venue and service provisions of Section 301 of Title III. By Section 212 of the Act, Congress specifically exempted "any matter which is subject to the provisions of the Railway Labor Act" from Title II which relates to conciliation and national emergencies. On the Brotherhood's interpretation of Section 501(3) this exemption in Section 212 was wholly unnecessary.

Congress did not make a specific exception for railway labor in Title III because it was concerned with the lack of uniformity in the various states of provisions for suits against labor organizations and it sought to provide a uniform law with respect to such suits. See *Senate Report No. 105, Calendar No. 104, 80th Cong., First Sess., pp. 15-18.* Since the Railway Labor Act contained no special provision for such suits in the case of labor organizations representing railway employees, there was no basis nor necessity for an exception and the Congress made none.[8] Parenthetically it might be noted that Title III of the Labor-Management Relations Act, which contains Section 301(c) also contains Section 304, forbidding political expenditures

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[8] The same Congress that passed the Labor-Management Relations Act also passed the new Judicial Code, providing in Section 1391 the following:

> "(C) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

A Congress that was thus concerned with uniformity with respect to corporate venue could hardly be assumed to have been less concerned with uniformity with respect to venue of labor organizations.

by labor organizations. Section 304 defines a "labor organization" in the exact language that the term is defined in the rest of the Act. It is common knowledge that the railroad labor organizations have created new organizations to handle political matters, just as have other labor organizations, apparently assuming that "labor organization" in Section 304 does not exclude organizations of railway employees. It hardly seems plausible that the term "labor organization" means one thing in Section 304 and another in Section 301.

Conclusion

The court below has erroneously decided three questions of substantial importance. Its decision refusing to apply the "local" venue statute is in conflict with the decisions of this Court. Its decision rejecting the local lodges and secretaries as representative of the class of membership of the Brotherhood is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Tunstall* case. Its failure to apply Section 301(c) of the Labor-Management Relations Act is in conflict with a decision of the District Court in the same Circuit in another case, is contrary to the position taken by the United States and raises an important and novel question of federal law which has not been, but should be, settled by the Supreme Court. The transfer to the Northern District of Ohio, after staying the preliminary injunction for 10½ months, is a gross misapplication of judicial power. It is, therefore, respectfully submitted that this petition should be granted.

JOSEPH L. RAUH, JR.,
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HENRY EPSTEIN,
Attorneys.

APPENDIX

28 U. S. C. § 112. Federal Venue Statute.

"(a) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

28 U. S. C. § 1406. Cure or waiver of defects.

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

§ 11-306—D. C. Code. General jurisdiction.

"Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

§ 11-308.—D. C. Code. Actions—Limitation upon—Inhabitants or sojourners in District of Columbia.

"No action or suit shall be brought in the District Court of the United States for the District of Columbia by original process against any person who shall not

be an inhabitant of, or found within, the District, except as otherwise specially provided."

Constitution: Article I, Section 8, Clause 17.

"The Congress shall have Power . . .

Cl. 17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—"

Constitution: Article III, Section 1.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Constitution: Article III, Section 2.

"Cl. 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State,

or the Citizens thereof, and foreign States, Citizens or Subjects."

Federal Rules of Civil Procedure.

"Rule 23, Class Actions.

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Labor-Management Relations Act, 1947 (Public Law No. 101, Chapter 120, 80th Cong., 1st Sess.)

"Sec. 301. (c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

16

No. 16

LEROY GRAHAM, ET AL.,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

JOSEPH L. RAUH, JR.,
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Attorneys for Petitioners.

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Opinions Below

The opinion of the district court granting petitioners a preliminary injunction is reported in 74 F. Supp. 663 and may be found at pages 62 to 66 of the record. The opinion of the court of appeals, which has not yet been reported, may be found at pages 73 to 79 of the record.

Jurisdiction

The judgment of the court of appeals was entered on October 26, 1948 (R. 80). The petition for writ of certiorari

was filed on December 7, 1948, and was granted on June 27, 1949 (R. 84). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (now 28 U. S. C. § 1254).

Statutes Involved

The pertinent provisions of the statutes involved in this case are set out in the Appendix.

Questions Presented

1. Whether the District Court for the District of Columbia has the dual jurisdiction of both a federal and a state court so that the "local" venue statute of the District of Columbia may be applied to a suit brought under the Railway Labor Act, which, in any of the States, could be brought in either the federal or the state court.

2. Whether District of Columbia lodges of the respondent Brotherhood of Locomotive Firemen and Enginemen and the secretaries of these lodges "fairly insure the adequate representation" of the entire class of membership of the respondent Brotherhood under Rule 23(a) of the Federal Rules of Civil Procedure for purposes of supporting venue in a class action in the District.

3. Whether the respondent Brotherhood of Locomotive Firemen and Enginemen was properly served with process.

4. Whether the Norris-LaGuardia Act prevented the district court from issuing a preliminary injunction restraining any additional discriminatory conduct by the Brotherhood during the pendency of the action.

5. Whether the district court abused its discretion in granting the preliminary injunction.

6. Whether, if the cause is remanded to the court of appeals for decision on any of the above questions, this

Court should direct the reinstatement of the preliminary injunction issued by the district court and vacated by the court below.

Statement

1. *Institution of Suit:* On October 27, 1947, petitioners, 21 negro firemen on the three major southeastern railroads, brought this suit to vindicate their rights under the Railway Labor Act (48 Stat. 1185; 45 U. S. C. §§ 151 et seq.) and the Constitution of the United States. Petitioners instituted the action on their own behalf and on behalf of all other negro firemen similarly situated against the railroads, the respondent Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the Brotherhood), the two District of Columbia Lodges of the Brotherhood and the secretaries of these two lodges (R. 1-4).

Petitioners' cause of action is based upon the decisions of this Court in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944), and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944). The complaint alleged that the Brotherhood, as sole bargaining agent of the entire class of locomotive firemen, including these petitioners and other negro firemen, had negotiated agreements and arrangements with the railroads which discriminate against colored firemen and deprive them of the rights and job assignments to which their seniority entitles them (R. 6-9). The complaint further alleged that, notwithstanding the determination by this Court that this discrimination was illegal and violative of the Railway Labor Act, respondent Brotherhood and the southeastern carriers continued to discriminate against petitioners and their class, resulting in the unlawful displacement and demotion of many negro firemen and their replacement by white firemen having less seniority (R. 9, 14).

The complaint further alleged that the Brotherhood maintains offices in the District of Columbia, acts as bargaining representative within the District and is otherwise doing business regularly within the District (R. 3); that two subordinate lodges of the Brotherhood maintain offices and secretaries within the District and are composed principally of members of the Brotherhood who reside in the District (R. 3-4); and that "defendants subordinate Lodges . . . are all the lodges of defendant Brotherhood within the District of Columbia and are truly and fairly representatives of the other subordinate lodges of Brotherhood and of Brotherhood itself, and the interest of all the members, subordinate lodges and of the Brotherhood will be adequately represented in this action by the defendants. The defendants subordinate Lodges and the defendants McQuade and Lacey (the secretaries) are sued as representatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure" (R. 4).

Petitioners' complaint sought a determination of their rights and those of their class, a permanent injunction against any further discriminatory practices, an order directing restoration of jobs unlawfully taken away, damages for loss of employment and wages by reason of the discriminatory practices, and a preliminary injunction pending final hearing and determination of the action (R. 15-16).

2. *Motion for Preliminary Injunction:* At the time of filing the complaint on October 27, 1947, petitioners moved the district court for a preliminary injunction to prevent further discrimination in job assignments pending the final determination of the action (R. 22-23). In support of this motion, petitioners filed a detailed affidavit by Benjamin F. McLaurin, Field Organizer of the Provisional Committee to Organize Colored Locomotive Firemen, who had been

in close and active association with these colored firemen and was fully familiar with the facts and practices complained of (R. 23-24). McLaurin's affidavit, in addition to confirming the allegations of the complaint (R. 24), stated that in 1944 the Supreme Court of the United States in the *Steele* and *Tunstall* cases held the discriminatory practices of the Brotherhood and the railroads involved to be violative of the Railway Labor Act (R. 29); that nevertheless the Brotherhood ignored these decisions and continued to carry out the provisions of the unlawful and discriminatory agreements and arrangements (R. 30); that the displacement of steam power by Diesel locomotives is growing and negro firemen are being displaced at an ever increasing rate; and that unless these discriminatory practices are stopped, the complete elimination of negroes from their time-honored jobs as locomotive firemen in the near future is inevitable (R. 30).

3. *Action of Brotherhood:* The Brotherhood filed no affidavit or other evidence challenging any of the facts set forth in the bill of complaint or the McLaurin affidavit. Instead, it filed a Motion to Dismiss or to Stay Further Proceedings on grounds, among others, of improper venue and failure of service (R. 39-40).

4. *The Position of the United States Government:* The United States filed a memorandum as amicus curiae in the district court in support of petitioners' request for a preliminary injunction. The Government stated in part as follows:

> "• • • we submit that there is a public as well as private interest in this litigation which requires that the defendants' unlawful discriminatory conduct be restrained at the earliest moment. Almost three years have elapsed since the Supreme Court held that the Brotherhood defendant was acting in violation of the federal statute, and that the discrimination based upon

face was 'invidious' as well as 'illegal.' The Brotherhood, and the railroads which have cooperated with it—whether willingly or not—have completely ignored and disregarded the Supreme Court's ruling. They have continued to go their own way without paying any attention to the law of the land as it has been applied to the very contract here in issue by the highest tribunal."

5. *Hearings before the District Court:* On November 10 and 25, 1947, the district court took testimony and heard full and complete arguments on the Brotherhood's motion to dismiss and on petitioners' motion for preliminary injunction (R. 46, 51). The district court gave the Brotherhood every opportunity to challenge the facts in the complaint and the McLaurin affidavit, but the Brotherhood refused to avail itself of the opportunity.

6. *Judgment of the District Court:* The district court denied the Brotherhood's defense of improper venue (R. 50-51) and rejected the Brotherhood's contentions that service had not been properly made (R. 59-61) and that the Norris-LaGuardia Act prevented the issuance of the injunction (R. 65-66). Thereafter the district court granted petitioners' motion for a preliminary injunction against the Brotherhood (R. 62-66) stating that there was "no doubtful question of law" since "we already have rulings by the Supreme Court of the United States and by the Circuit Court of Appeals for the Fourth Circuit condemning as illegal the specific practices set forth in the complaint" (R. 65). On December 3, 1947, the district court entered its findings of fact and conclusions of law and issued a preliminary injunction restraining the Brotherhood and the railroads from discriminating against petitioners and other negro firemen by denying them their seniority rights on job assignments made after the date of the order (R. 70-72).

7. *Proceedings in the Court of Appeals:* The railroads did not appeal from the preliminary injunction, but the Brotherhood petitioned the court below for the allowance of a special appeal under D. C. Code, Section 17-101, and a stay of the preliminary injunction. On December 9, 1947, over petitioners' objections, the court below ordered that the preliminary injunction granted by the district court be stayed pending final action on the petition for special appeal (R. 81). On January 5, 1948, again over petitioners' objections, the court entered an order allowing the special appeal and continuing the stay of the preliminary injunction pending final disposition of the appeal (R. 82). On February 3, 1948, petitioners moved the court to advance the oral argument because the stay made possible continued discrimination, but the motion was denied. Argument was finally heard on April 13, 1948 and on October 26, 1948, the court entered its opinion and judgment holding that the venue in the instant case was "mischosen" (R. 73). The court reversed the district court's holding that the District Court for the District of Columbia has the dual jurisdiction of both federal and state courts so that the "local" venue statute of the District of Columbia may be applied to a case under the Railway Labor Act which, in any of the States, could be brought in either the federal or the state court. The court also reversed the district court's holding that venue was properly laid in the District of Columbia under the federal venue statute considering the case as a class suit, a holding fully supported by the decision of the United States Court of Appeals for the Fourth Circuit in *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403 (C. C. A. 4th, 1945). Rejecting both of these arguments, either of which would sustain venue in the district court, the court below, after having stayed the preliminary injunction for almost a

year, directed the district court to transfer the case to the Northern District of Ohio.[1]

Specification of Errors to Be Urged

The court below erred:

1) In holding that the "local" venue statute of the District of Columbia is inapplicable to a suit under the Railway Labor Act.

2) In holding that local lodges of the Brotherhood and their secretaries will not "fairly insure the adequate representation" of the entire class of the membership of the Brotherhood under Rule 23(a) of the Federal Rules of Civil Procedure.

3) In directing the district court to transfer the case to the Northern District of Ohio without any evidence or finding in the record to indicate that the suit could have been brought in that district.

Summary of Argument

I

Venue was properly laid in the District Court for the District of Columbia because the Brotherhood was properly sued as an entity under the District of Columbia Code (Section 11-306) and because the membership of the Brotherhood was properly sued as a class under the federal venue statute (28 U. S. C. § 112; now 28 U. S. C. § 1391).

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[1] The statute under which the court below purported to act provides for the transfer of a case of mischosen venue "to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). As far as appears from the record and as far as petitioners are informed, the railroads involved do no business in the Northern District of Ohio and the court below made no finding that this case could have been brought there.

A

The Brotherhood is "doing business" in the District of Columbia through its subordinate lodges and its national office located in the District. It is thus "found" in the District of Columbia and subject to suit under the District of Columbia Code.

The "local" venue statute of the District of Columbia is clearly applicable by its terms to this action and there is no suggestion in the statute or legislative history that Congress did not mean what it said. Petitioners' cause of action arises under the Railway Labor Act and is cognizable by both federal and state courts. Since petitioners' suit could have been brought in a state court in another jurisdiction and since the courts of the District of Columbia have the dual jurisdiction of both federal and state courts, it is clear that the "local" venue statute is applicable when the action is brought in the courts of the District of Columbia.

The court below artificially injected the question of Article III versus Article I power into a case where it has no relevance. Article III defines the cases which may be brought in the federal courts; venue is a matter of where suits may be brought in the geographical sense. But even if the question of Article III versus Article I power were relevant, there is no conflict between the Articles as applied to the present case which, in any of the States, could have been brought in either the federal or the state court.

B

The two District of Columbia lodges of the Brotherhood and the secretaries of these lodges are inhabitants of the District of Columbia, thus satisfying the inhabitancy requirement of the federal venue statute. The lodges and their secretaries "insure the adequate representation of

all" the subordinate lodges and the membership of the Brotherhood as a class under Rule 23(a) of the Federal Rules of Civil Procedure. The local lodges and their secretaries have an identical interest with the entire membership of the Brotherhood in the preservation of the Brotherhood's treasury to which they contribute and upon which they rely in time of need. They have a common interest in the successful functioning of the organization and its policies. They have common lawyers whom the institution of this action "did bring . . . in fighting" (*Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 406) and who will insure that the membership of the Brotherhood is "in fact adequately represented by parties who are present . . ." *Hansberry* v. *Lee*, 311 U. S. 32, 43 (1940).

II

Before both the district court and the court below, respondent Brotherhood urged that it had not been properly served with process, that the Norris-LaGuardia Act prohibited the issuance of the preliminary injunction, and that the preliminary injunction should not have been granted because it alters the status quo. The district court ruled against the Brotherhood on all three contentions and the court below was not called upon to consider them. In its Opposition to the petition for certiorari the Brotherhood stated that "in the event this case is reviewed by this Court, respondent will urge those additional grounds for affirmance" (p. 4, note). Petitioners join the Brotherhood in urging this Court to pass upon these three questions. In the exercise of a sound discretion this Court should now resolve these three questions and terminate the dispute over the preliminary injunction which has already extended over far too long a period during which additional colored firemen have been deprived of their hard-earned rights.

A

Respondent Brotherhood was properly served with process as an entity in its common name under Rule 4(d)(3) and as a class under Rule 23. The district court took testimony and found that the defendant subordinate lodges and their secretaries were served with process and that "their duties and relation to the defendant Brotherhood are such that it is reasonable to conclude that they would give notice of this action to the proper officers of the defendant Brotherhood . . ." (R. 45). Service of process was thus valid against the Brotherhood as an entity in its common name (*Operative Plasterers Association* v. *Case*, 93 F. (2d) 56 (App. D. C., 1937); *Brotherhood of Trainmen* v. *Agnew*, 170 Miss. 604, 155 So. 205 (1934); see *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945)) and against the membership of the Brotherhood as a class (*Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403).

B

The Norris-LaGuardia Act is inapplicable to the present suit to vindicate rights under the later Railway Labor Act. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944); *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515 (1937). This Court held that a proper cause of action had been made out in the *Tunstall* case despite the fact that the complaint in that case failed to meet the requirements of the Norris-LaGuardia Act for the issuance of an injunction. Earlier, in the *Virginian Ry.* case, this Court expressly held the Norris-LaGuardia Act inapplicable to an effort by employees to vindicate their rights under the Railway Labor Act. No doubt it was because of the *Virginian Ry.* case that the Brotherhood never raised this Norris-LaGuardia point

in six years of litigation concerning the colored firemen until the present suit was instituted.

C

The granting or denial of a preliminary injunction is a matter resting in the sound discretion of the trial court and will not be disturbed except in a plain case of abuse of that discretion. *Meccano Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141 (1920); *Alabama* v. *United States*, 279 U. S. 229 (1929). There was no such abuse here. None of the facts alleged in the complaint or McLaurin's affidavit were in any way disputed by the Brotherhood. The questions of law have been definitely decided against respondent by this Court and the Fourth Circuit Court of Appeals. Public as well as private rights are involved and courts of equity "go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 552 (1937). Therefore, even if the preliminary injunction could be said to disturb the status quo in the sense that it prevents new discriminations against negro firemen, that consideration could hardly override these compelling reasons for interlocutory relief. But in a real sense the order of the district court preserves the status quo. It does not require the parties to undo the past discriminations against the colored firemen; it requires only that in the future assignment of "runs", petitioners and their class be given the assignments to which their seniority entitles them.

III

Petitioners respectfully urge this Court, if it should determine to send the case back to the court of appeals for action on any of the three questions discussed under Point II, to direct the court below to vacate the stay and

reinstate the preliminary injunction during the pendency of the case in that court. Indeed, unless this ancillary relief is granted, more and more colored firemen will be deprived of their time-honored positions on the southeastern railroads and the ultimate judgment will be a hollow victory.

ARGUMENT

I

Venue Was Properly Laid in the District Court for the District of Columbia

Venue was properly laid in the District Court for the District of Columbia for two independent and valid reasons. First, the Brotherhood was properly sued as an entity under the District of Columbia Code; second, venue was properly laid in the district court under the federal venue statute considering the action as a suit against the membership of the Brotherhood as a class.

A

Venue Was Properly Laid in the District Court under the "Local" Venue Statute of the District of Columbia Code.

Petitioners contended before the district court and before the court of appeals that venue was properly laid against the Brotherhood as an entity in the District of Columbia under the "local" venue statute of the District of Columbia (Section 11-306,[2] D. C. Code) providing for suit

[2] Section 11-306 provides that the district court "shall have cognizance . . . of all cases in law and equity between parties, both or either of which shall be resident or be found within said district . . ." The opinion of the court below discusses only Section 11-308, D.C. Code, although Section 306 is plainly applicable. Section 308 of the same title reinforces the express provisions of Section 306 conferring jurisdiction under the facts of this case. Both sections, of course, contain the all-important word "found".

against a defendant "found" in the District. There cannot be any serious question that the Brotherhood is "doing business" in the District of Columbia [3] and is thus "found" within the District under the "local" venue statute. See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945); *Frene* v. *Louisville Cement Co.*, 134 F. (2d) 511 (App. D. C., 1942). The sole question, therefore, is whether this "local" venue statute applies to petitioners' suit.

Petitioners' cause of action in this case, although arising under the Railway Labor Act, is entertainable not only by federal district courts but by state courts as well. This concurrent jurisdiction of both state and federal courts of petitioners' cause of action is clearly indicated by *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944), which arose through the state courts, and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944), which arose through the federal courts. Since petitioners' action could have been brought in a state court in another jurisdiction, it is clear that the "local" venue statute applies when the action is brought in the courts of the District of Columbia.

Exactly why the court below injected the issue of Article III versus Article I power into this case is not clear. Congress, acting under the Commerce Clause (see *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 553 (1937)), passed the Railway Labor Act and gave petitioners rights

[3] The court below did not pass upon the question whether the Brotherhood was "doing business" within the District of Columbia, but it is not believed that the district court's ruling that the Brotherhood was "doing business in the District of Columbia" (R. 50) can be seriously challenged. Two of its subordinate lodges (these were joined as defendants) are located in the District of Columbia and each of the lodges has a substantial number of dues-paying members (R. 4, 52-59). The Brotherhood moreover maintains a national office in the District in which one of its vice-presidents and a clerical assistant are permanently stationed and through which its national legislative activities are carried out (R. 40). In fact, the very Southeastern Carriers Agreement under attack in this case was executed in the District of Columbia (R. 17-19).

enforceable in either federal or state courts. Petitioners have chosen the District of Columbia courts as the forum in which to vindicate these rights—the railroads and the respondent Brotherhood are both doing business in the District—in an effort to enforce the *Steele* and *Tunstall* rulings in a single lawsuit. The District of Columbia venue statute is clearly applicable by its terms to this action and there is no suggestion in the statute or legislative history that Congress did not mean what it there said. The statute is a valid exercise of Congressional power whether enacted under Article III or under Article I, Section 8, Clause 17, or under some other section of the Constitution. There is no more of a constitutional issue raised by the application of the District of Columbia venue statute to this suit than there is by the application of a state venue statute to the ordinary suit in a state court under any of the many federal statutes providing for concurrent federal and state jurisdiction. See *Second Employers' Liability Cases*, 223 U. S. 1 (1912). The court below has thus artificially injected a question of Article III versus Article I power into a case where it has no relevance. But because the court below has based its decision upon this Article III versus Article I issue, counsel feel obliged to deal with the arguments made by the court below on this issue.

* * * * * * *

The dual jurisdiction of the courts of the District of Columbia as both federal and state courts has been settled by authoritative decisions of this Court. Thus, in *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442-443 (1923), a unanimous Supreme Court, speaking through Mr. Chief Justice Taft, stated:

> "This (cl. 17, § 8 Art. 1) means that as to the District Congress possesses, not only the power which belongs to it in respect of territory within a state, but

> the power of the state as well. In other words, it possesses a dual authority over the District and may clothe the courts of the District, not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts. *Kendall* v. *United States*, 12 Pet. 524, 619. • • • Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state Legislature has in conferring jurisdiction on its courts."

See, to the same effect, *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 700 (1927).

In *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), this Court, after quoting with approval the above language from the *Keller* case as to the dual jurisdiction of the courts of the District of Columbia (289 U. S. at 545), went on to state that the jurisdiction conferred upon the courts of the District of Columbia under Article III of the Constitution and the jurisdiction conferred under Article I "are not incompatible." 289 U. S. at 546. All that this Court held in the *O'Donoghue* case was that salaries of the judges in the higher courts of the District of Columbia could not be reduced because these courts had been established under Article III; the Court made it abundantly plain in its decision that these District of Columbia courts exercised the dual jurisdiction of federal and state courts. 289 U. S. at 545. All four opinions in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582 (1949) recognized this dual jurisdiction of the District of Columbia courts.

This principle had been stated with extreme clarity by the court below in the earlier and apparently overlooked case of *King* v. *Wall & Beaver Street Corp.*, 145 F. (2d)

377, 380 (App. D. C., 1944). There the court, speaking through Chief Justice Groner, had pointed out:

> "The District Court of the United States for the District of Columbia, as we have often said, is clothed with a two-fold jurisdiction. It has all the ordinary and usual jurisdiction of a State court in respect to matters which in a State would be exercised by a State court, and this it attains by Acts of Congress under the provisions of Section 8 of Article I of the Constitution. It likewise has all of the jurisdiction and powers of United States district courts elsewhere, and this jurisdiction is, in turn, conferred by Acts of Congress under Article III of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516."

In the *King* case, plaintiffs sought to maintain an action which failed to meet the requirements of the federal venue statute, and was equally improper under the "local" venue statute. Plaintiffs tried to lay venue in the District of Columbia by using part of each statute. The court of appeals correctly held that venue could not be established by intermingling parts of the two venue provisions, but it made clear that there would be jurisdiction if plaintiffs could meet the requirements of either the federal or the "local" venue statute.

We respectfully submit that, in the light of this dual or two-fold jurisdiction of the courts of the District of Columbia, the reasoning in the opinion of the court below is wholly incorrect and has led the court to its patently erroneous conclusion.

(1) The court below seems to have based its decision on the assumption that if the "local" venue statute were applied to this case, it would *affect* or *nullify* the federal venue statute. This overlooks the dual jurisdiction of the courts of the District of Columbia so clearly defined in the

cases referred to above. The application of the "local" venue statute to this cause of action, which could have been brought in either a federal or state court, no more affects or nullifies the federal venue statute than did the application of the Alabama venue statute when the *Steele* case was brought in the state court. Certainly one cannot say that the federal venue statute is *affected* or *nullified* when a state venue statute is applied and a suit is entertained in the state court simply because the suit might also have been brought in a federal court in a situation in which there is concurrent jurisdiction. No more can it be said that the federal venue statute is *affected* or *nullified* when the "local" venue statute of the District of Columbia is applied to a suit in the District of Columbia courts simply because the federal venue statute might have been applied as a result of the concurrent jurisdiction of federal courts of the cause of action.[4]

This erroneous assumption in the opinion below is illustrated by the court's reliance on *Doyle* v. *Loring*, 107 F. (2d) 337 (C. C. A. 6th, 1939), *cert. den.* 309 U. S. 686 (1940). That was a suit in the federal district court in Tennessee by non-resident heirs against a non-resident administratrix for a discovery of the deceased's assets. The suit was brought in the federal court on the basis of diversity of jurisdiction. Venue did not properly

[4] The court below relied (R. 76) upon the following passage from the *O'Donoghue* case: ". . . the judicial power thus conferred is not and cannot be affected by the additional congressional legislation enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere . . ." (289 U. S. at 546). This passage, a part of a sentence, was written in conection with a wholly different problem: namely, whether Article I power should be construed as authorizing a reduction in judges' salaries expressly forbidden by Article III. This Court, in the very next sentence, pointed out that "the two powers are not incompatible" and should not be so read. There is no incompatibility between the two powers in the case at bar except as the decision of the court below creates it.

lie in the federal district court in Tennessee because neither the plaintiff nor the defendant were residents of the district. The plaintiff in the federal court tried to rely upon the state venue statute, and of course, the court held that the state venue statute could not be applied in the federal court. This Tennessee case is the inverse of the case at bar. Applying the decision below in the instant case to the situation in the Tennessee case, it would amount to this: if the plaintiff there had brought his suit for discovery in the Tennessee state court, the state judge should have refused to entertain the action because there was concurrent jurisdiction in the federal courts and the state judge would be *affecting* or *nullifying* the federal venue statute by applying the local state venue statute to the case before him. Merely to state this proposition illustrates the complete fallacy in the court's reasoning in the instant case.

What may have confused the court below is the difference between "exclusive" and "concurrent" jurisdiction of federal courts. If the case at bar were one of "exclusive" federal jurisdiction—e.g., admiralty, maritime, patent, copyright (28 U. S. C. §§ 1333, 1338)—the case could only be brought in a federal court and therefore, it might conceivably be argued that the "local" venue statute was not intended to apply to a suit in the District of Columbia. But where as here, the case is one of "concurrent" jurisdiction which can be brought in either federal or state courts, if it is brought in a state court, the local state venue statute applies; similarly, if it is brought in the courts of the District of Columbia, the "local" venue statute is equally applicable.

(2) The second erroneous assumption in the opinion below lies in the suggestion that the present case "*requires the exercise of Article III power.*" The present case no more requires the exercise of Article III power because

brought in the courts of the District of Columbia than it would if brought in a state court. The present case does require the exercise of judicial power and since it requires the exercise of judicial power, it may be reviewed by this Court, which, of course, it could not be if it required only the exercise of executive, legislative or administrative power. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 (1923). But the exercise of *judicial* power is quite different from the exercise of *Article III power.*

This difference between Article III power and judicial power is made clear in *Williams* v. *United States*, 289 U. S. 553, 565-566 (1933), holding that the Court of Claims is not an Article III court for purposes of protecting judges' salaries against Congressional action. Nevertheless, this Court there stated that the Court of Claims and other legislative courts "possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution" (289 U. S. at 566). This Court made this same distinction between judicial power and legislative, executive or administrative power in defining the nature of the courts of the District of Columbia in the *O'Donoghue* case when it stated that Congress "has conferred upon these [D. C.] courts jurisdiction over nonfederal causes of action, or over quasi judicial or administrative matters * * *" (289 U. S. at 545).

Furthermore, even if there were any merit in the suggestion that the present case "requires the exercise of Article III power," it would still be a complete non sequitur to argue from that premise to the conclusion that the "local" venue statute is not applicable to this case. Article III power goes to the question of what types of cases can be brought in the federal courts; venue deals with the question where suits may be brought. The court below went astray when it confused these two questions and read Arti-

cle III in opposition to, rather than in harmony with, Article I. See footnote 4, p. 18, *supra*.

The "local" venue statute is apparently based on Article I, Section 8, Clause 17 of the Constitution[5] and makes it possible for the district court and the court of appeals to entertain judicial actions that would ordinarily be heard in state courts elsewhere than in the District of Columbia. The present case was brought in the District Court for the District of Columbia and was thus properly governed by the venue statute of the District of Columbia.

(3) The court below stated in its opinion that "it is not to be thought that Congress intended that a defendant sued in a case requiring the exercise of such power [Article III] should have less protection in respect of venue when the suit is commenced in the District Court of the United States for the District of Columbia than he would have if the suit had been commenced in any other United States district court also exercising Article III power." The concept of "protection" of the defendant is a wholly gratuitous one as applied to this case, since this is a suit which could have been brought in a state court. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944). If petitioners had sued the Brotherhood in a state court, the local state venue statute would have applied. How can it be said that there is less protection of defendant when petitioners sue in the courts of the District of Columbia and rely upon the "local" venue statute?

What the decision below really does is to curtail the "protection" given to litigants in the District of Columbia courts by denying them the "state" forum which they

[5] This is not to suggest that the "local" venue statute could not have been enacted as a proper exercise of Article III power, or under some other Congressional authority. We are simply assuming, since the section has historically been a part of the District of Columbia Code, that it was enacted under Article I, Section 8, Clause 17.

would have in any of the States in cases of concurrent jurisdiction. The serious consequences of such a restriction, if permitted to stand, can be illustrated by the circumstances of the litigation at bar. The court below directed the district court to transfer the case to the Northern District of Ohio pursuant to 28 U.S.C. § 1406(a). Assuming this section has any application to a suit pending at the time of enactment, the section expressly limits transfer of a suit to a district "in which it could have been brought." The court below made no finding that this action could have been brought in the Northern District of Ohio nor could it have done so in this case. If the Brotherhood can only be sued in Ohio where it is an inhabitant, it may not be suable at all to enjoin the violation of the Railway Labor Act. The complaint alleges that the defendant railroads operate along the eastern seaboard (R. 2) and they are in all probability not doing business in Ohio so that neither the federal nor state courts of Ohio would have jurisdiction over this cause of action.

Not only does the decision below discriminate against litigants in the District of Columbia courts by denying them the "state" forum, but it also sets up a completely unworkable venue procedure for the District of Columbia. If the decision of the court below means anything, it must mean that in order to invoke the "local" venue statute in any case in the District of Columbia, a plaintiff will have to show that if he had brought the suit in another jurisdiction, he could not have brought the suit in a federal court. In other words, "federal jurisdiction" will have to be negatived every time an effort is made to utilize the "local" venue statute in the District of Columbia courts. Neither the Congress nor this Court ever intended or sanctioned so unworkable a result.

B

Venue Was Properly Laid in the District Court under the Federal Venue Statute Considering the Case as a Class Suit

Petitioners contended before the district court and before the court of appeals that venue was properly laid in the District of Columbia because the suit was brought as a class suit as well as a suit against the Brotherhood in its common name. The two District of Columbia lodges of the Brotherhood and the two secretaries of those lodges were joined as defendants along with the Brotherhood. Since these two local lodges and their two secretaries are inhabitants of the District, the inhabitancy requirement of the federal venue statute, 28 U.S.C. § 112 (now 28 U.S.C. § 1391), is fully satisfied. The sole question is whether these two local lodges and their two secretaries "insure the adequate representation of all" the class under Rule 23(a) of the Federal Rules of Civil Procedure.

Paragraph 12 of the bill of complaint (R. 4) is clear and explicit:

> "12. Upon information and belief, defendants subordinate Lodges No. 7 and No. 532 are all the lodges of defendant Brotherhood within the District of Columbia and are truly and fairly representatives of the other subordinate lodges of Brotherhood and of Brotherhood itself, and the interest of all the members, subordinate lodges and of the Brotherhood will be adequately represented in this action by the defendants. The defendants subordinate Lodges and the defendants McQuade and Lacey (the secretaries) are sued as representatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure."

The above allegation brings this case squarely within Rule 23(a) and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, upon which the district court relied in upholding venue. The allegations in the *Tunstall* case, as set forth in Judge Parker's opinion, are identical with the allegations in the case at bar.

Despite this, the court below held that the two local lodges and their secretaries did not "insure the adequate representation of all" the class under Rule 23(a), since these lodges and officers did not engage in the discriminatory agreements and arrangements charged against the Brotherhood. The court's distinction of the *Tunstall* case boils down to this: The District of Columbia lodges, so far as the record in this case shows, have no discriminatory agreements with the railroads; the lodges in the *Tunstall* case had such agreements; therefore, the lodges in the *Tunstall* case were representative of the entire class, whereas, the District lodges are not. But the question whether the members of the class sued will fairly represent the interest of the absent members in the litigation does not turn on whether those joined have participated as fully as the others in the acts complained of. The true test is whether the interests of the named defendants are sufficiently similar to those of the other members of the class to insure that the membership of the Brotherhood is "in fact adequately represented by parties who are present * * *" *Hansberry* v. *Lee*, 311 U. S. 32, 43 (1940).

The local lodges and secretaries have an identical interest with the Brotherhood in the preservation of the Brotherhood's treasury to which they contribute and upon which they rely in time of need. They have a common interest in the successful functioning of the organization and its policies. They have common lawyers whom the institution of this action "did bring . . . in fighting". *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F.

(2d) 403, 406. The lodges and officers joined as defendants have no interests which are "antagonistic to those whom . . . [they] would represent." *Moore's Federal Practice*, p. 2232 (1938). Just as in the *Tunstall* case, the local lodges and secretaries will fairly represent the entire class. See *Hansberry* v. *Lee*, 311 U. S. at 41-43.[6]

II

The District Court Did Not Err in Granting the Preliminary Injunction

The succeeding argument in petitioners' brief is predicated upon the assumption that this Court disposes of the argument under Point I in petitioners' favor and holds on one or both grounds that venue is properly laid in the District of Columbia. If this should not be the case, the remaining parts of the brief will, of course, not be relevant.

Before both the district court and the court below respondent Brotherhood urged that it had not been properly served with process, that the Norris-LaGuardia Act prohibits the granting of the preliminary injunction, and that the preliminary injunction should not have been granted because it alters the status quo. The district court rejected all three of these arguments (R. 59-61, 65-66, 65) and issued the preliminary injunction (R. 70-72). The court below did not rule on these three points because it held that venue had been mischosen. In its Opposition to the petition for certiorari the Brotherhood stated that "in the event this case is reviewed by this Court, respondent will urge those additional grounds for affirmance" (p. 4, note). Petitioners join the Brotherhood in urging this Court to pass upon these three questions. The Court has the bene-

[6] Moore's Federal Practice refers to an action "by or against representatives of an unincorporated association" as "a good illustration" of the "true class suit" (p. 2236). The decision below, if permitted to stand, would seriously curtail the utility of the device of a class action which Rule 23(a) was designed to afford.

fit of an adequate record and a well-reasoned decision of the district court; in the exercise of a sound discretion, this Court should resolve these questions and terminate the dispute over the preliminary injunction. *Ecker* v. *Western Pac. R. R. Corp.*, 318 U. S. 448, 489 (1943); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567, 568 (1931); *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920); *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588-589 (1911). The return of the case to the court of appeals for a decision on one or more of these three questions would only further delay the determination of a case already far too long delayed and result in the displacement of and extreme injustice to additional colored firemen.

A

Service of Process

Respondent Brotherhood not only relied in the courts below on its plea of "improper venue", but it even contended that it had not been served with process. The district court, in denying the Brotherhood's motion to quash service, referred to the motion "as technical and dilatory" and stated that courts are "astute not to sustain such a motion in cases where it is clear that notice actually reached the defendant" (R. 59)—as it did here.

As a matter of fact, it is perfectly clear that in this case the Brotherhood was properly served with process not only as an entity in its common name under Federal Rule 4(d)(3) but also as a class under Rule 23. A brief reference to each point will suffice.

1. The Brotherhood is, of course, suable as an entity in its common name (*United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344 (1922); *Busby* v. *Electric Utilities Union*, 147 F. (2d) 865 (App. D. C., 1945)) and service was accomplished in accordance with Rule 4(d)(3)

which provides for service upon an "unincorporated association which is subject to suit under a common name, by delivering a copy • • • to any • • • agent authorized • • • by law to receive service of process. • • •" What is required by Rule 4(d)(3) and what was performed here was service in accordance with principles of general or common law. *Moore's Federal Practice*, p. 307 (1938). The Marshal's return shows that he served Russell, who was in charge of the Washington office of the Brotherhood in the absence of the Vice-President because of illness, and McQuade, Lacey and Reynolds, the recording and financial secretaries of the two subordinate lodges of the Brotherhood in the District. The testimony of Lacey and Reynolds and the Constitution of the Brotherhood itself demonstrate that these secretaries not only collect and transmit funds to the Brotherhood, but perform a myriad of other duties on its behalf (R. 52-59). The district court took testimony and found "that the defendant subordinate lodges which were served with process are agents of the defendant Brotherhood for that purpose, and that the defendants William Lacey and Marven M. McQuade and J. P. Reynolds, who were served with process are officers of subordinate Lodges of the defendant Brotherhood and that their duties and relation to the defendant Brotherhood are such that it is reasonable to conclude that they would give notice of this action to the proper officers of the defendant Brotherhood • • •" (R. 45). See *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320 (1945); *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940).

Service of process on the secretary of a local union is valid service on the International Union. *Operative Plasterers Association* v. *Case*, 93 F. (2d) 56 (App. D. C., 1937);[7]

[7] The exact question in the *Operative Plasterers* case was whether the service underlying a North Carolina judgment (service on the secretary of a local union) was sufficient to accord that judgment the right to full

Brotherhood of Trainmen v. *Agnew*, 170 Miss. 604, 155 So. 205 (1934). As Judge Parker stated in the *Tunstall* case, involving the validity of service on an officer of a local lodge of the same defendant Brotherhood, "an association or corporation certainly ought not to be heard to say that agents through which it transacts the very business for which it is organized and through which it collects funds in a given territory are not agents of such character that process may be served upon them." *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 406. No authority or reason has been suggested why more should be required here than that service be made "by a method reasonably calculated to give the person or entity knowledge of the attempted exercise of jurisdiction and an opportunity to be heard." *Operative Plasterers Association* v. *Case*, 93 F. (2d) 56, 65. Here service was upon financial and recording secretaries of the local lodges whose duties require their constant contact with the Brotherhood and the fact is that this service did result in notice of the suit being given to the proper officers and "did bring the Brotherhood in fighting." *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 406.

2. As already pointed out, petitioners brought this suit not only against the Brotherhood an an entity, but also against its membership as a class. Thus, paragraph 12 of the bill of complaint states that "the defendant subordinate lodges and the defendants McQuade and Lacey are sued as representatives of the membership of all the subordinate lodges and of the Brotherhood itself as a class under Rule 23(a) of the Federal Rules of Civil Procedure" (R. 4). These allegations in the bill of complaint are modeled upon the allegations in the *Tunstall case*, and as

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faith and credit in a suit against the International Union in the District of Columbia, but there were no peculiar requirements for service under North Carolina law and the general rule of law applicable under Rule 4 (d)(3) was applied to the question of service by the court.

Judge Parker said there, "it cannot be contended with any show of reason that Munden (the secretary) and the subordinate lodge, who were admittedly served, were not fairly representative of the membership of the brotherhood, or that service upon them would not give adequate notice to the class sued to come in and defend; and this, we think, is the criterion as to the sufficiency of joinder and service in a class sued." *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. (2d) 403, 406.

B.

THE NORRIS-LAGUARDIA ACT

The Norris-LaGuardia Act, 29 U. S. C. §§ 101-115, is inapplicable to petitioners' suit to vindicate their rights under the subsequently enacted Railway Labor Act. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944); *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515 (1937). The decision in the *Tunstall* case and the specific holding and express language in the *Virginian Ry.* case dispose of respondent Brotherhood's contention as to the applicability of the Norris-LaGuardia Act which, it might be noted, is raised in this suit for the first time after six years of earlier litigation.

In the *Tunstall* case this Court held that the bill of complaint stated a proper cause of action for equitable relief in the federal courts. 323 U. S. at 213-214. The Court so held although it was quite clear that the complaint did not contain the various allegations—disproportionate injury, failure of public officers to protect property, efforts at mediation, etc.—required by the Norris-LaGuardia Act (29 U. S. C. §§ 107, 108).[8] Despite the failure of the Brother-

[8] When the *Tunstall* case went back for trial, a summary judgment against the Brotherhood was entered by the district court, 69 F. Supp. 826, affirmed by the Fourth Circuit Court of Appeals, 163 F. (2d) 289 and certiorari was denied by this Court, 332 U. S. 841 (1947). The summary

hood and the railroads to raise this point, it would have been appropriate for this Court to consider the applicability of the Norris-LaGuardia Act *sua sponte* since the question goes to the jurisdiction of the court to issue an injunction. "Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction." *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684, 690 (1927); *Douglas* v. *City of Jeannette*, 319 U. S. 157, 162 (1943).

One does not have to go far to determine why neither Mr. Chief Justice Stone, who wrote the opinion in the *Tunstall* case, nor the Brotherhood nor the railroads raised the question of the Norris-LaGuardia Act in that case. The reason is the unanimous opinion of this Court in *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515 (1937), also written by Mr. Chief Justice Stone, which is determinative of the question in the present case as it was in the *Tunstall* case. Like the present case and the *Tunstall* case, the *Virginian Ry.* case was an action by employees to obtain an injunction to enforce rights granted by the Railway Labor Act. Mr. Chief Justice (then Mr. Justice) Stone's opinion, holding the Norris-LaGuardia Act inapplicable, is clear and concise (300 U. S. at 562-563):

> "Petitioner assails the decree for its failure to conform to the requirements of section 9 of the Norris-LaGuardia Act (29 U. S. C. A. § 109), which provides: 'Every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in • • • findings of fact made and filed by the court'. The evident purpose of this section, as its history and context show, was not to preclude man-

judgment, of course, would have been improper if the Norris-LaGuardia Act were applicable, since no injunction may be issued except on testimony taken in open court (29 U.S.C. § 107).

datory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court. We deem it unnecessary to comment on other similar objections, except to say that they are based on strained and unnatural constructions of the words of the Norris-LaGuardia Act, and conflict with its declared purpose, section 2 (29 U. S. C. A. § 102), that the employee 'shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'

"It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of section 2, Ninth, of the Railway Labor Act (45 U. S. C. A. §152, subd. 9), authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act • • •"

Just as in the *Virginian Ry.* case, here we have an attempted application of the Norris-LaGuardia Act which would conflict with its declared purpose of freeing the employee from employer coercion. Just as in the *Virginian Ry.* case, here we have a suit to vindicate collective bargaining rights under the Railway Labor Act, and "its provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

Mr. Chief Justice Stone in the *Steele* case pointed out the similarity between the rights being enforced in that case and the rights enforced in the *Virginian Ry.* case, as follows (323 U. S. at 207):

"• • • For the present command there is no mode of enforcement other than resort to the courts, whose jurisdiction and duty to afford a remedy for a breach of statutory duty are left unaffected. *The right is*

> *analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft*, a right which this Court has enforced and protected by its injunction in Texas & N. O. R. Co. *v.* Brotherhood of Railway & S. S. Clerks, supra, 281 U. S. 556, 557, 560 and in Virginian R. Co. *v.* System Federation, supra, 300 U. S. 548 and like it is one for which there is no available administrative remedy" (italics supplied).

This statement was incorporated by reference in the *Tunstall* case (323 U. S. at 213-214) and evidences the similarity between the rights asserted in the *Virginian Ry.*, *Steele* and *Tunstall* cases.

The action of this Court in the *Tunstall* and *Virginian Ry.* cases is firmly rooted in the history, purposes and procedures of the Norris-LaGuardia Act, as well as in the subsequently enacted Railway Labor Act. The entire history of the Norris-LaGuardia Act demonstrates that it was aimed at the abusive use of the injunction against the rights of labor. See Frankfurter and Green, *The Labor Injunction* (1930), Chapt. V. One has only to look at the public policy set forth by Congress in the Norris-LaGuardia Act and at its basic provisions to see the evil under attack. In Section 102, Congress declared that the individual unorganized worker is commonly helpless to obtain acceptable conditions of employment, that he should have full freedom of self organization, and that "he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. § 102). In Section 103 Congress outlawed the so-called "yellow-dog" contract (29 U.S.C. § 103). In Sections 104 and 105, Congress denied United States Courts jurisdiction to enjoin various acts connected with strikes, picketing and

"yellow-dog" contracts (29 U.S.C. §§ 104, 105). A law so conceived is not to be invoked to prevent a group of colored firemen from obtaining rights subsequently conferred by the Railway Labor Act.

Not only do the history and purposes of the Norris-LaGuardia Act show that Congress contemplated a situation far afield from the present action, but its methods of accomplishing those purposes are equally far afield. The operating provisions of the Norris-LaGuardia Act do not make practical sense as applied to petitioners' cause of action. For example, a finding "that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection" (29 U.S.C. § 107(e)) can have no place in this case. See *United States* v. *United Mine Workers of America*, 330 U. S. 258, 276 (1947). Nor, for example, are efforts at mediation or arbitration a realistic requirement as applied to a dispute between the colored firemen and the Brotherhood which purports to be their bargaining representative (29 U.S.C. § 108).

The action of this Court in the *Tunstall* and *Virginian Ry.* cases disposes of respondent's belated effort to rely upon the Norris-LaGuardia Act as a shield for continuing its discriminatory acts. Petitioners' rights under the Railway Labor Act cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act, a law whose history, purposes and methods are far afield from the present action.[9]

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[9] In the courts below respondent relied upon two cases in which this Court refused to allow an employer to enjoin the picketing of his premises. *Lauf* v. *Shinner*, 303 U. S. 323 (1938); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552 (1938). As we have already seen, the Act was passed to prevent exactly that. These cases have no relationship to the case at bar where a group of employees are seeking to enforce their rights to the fair representation guaranteed by the Railway Labor Act.

C

THE PRELIMINARY INJUNCTION WAS A PROPER EXERCISE OF THE DISTRICT COURT'S DISCRETION

Few principles of law are more firmly established than the one which recognizes that the granting or denial of a preliminary injunction is a matter resting in the sound discretion of the trial court; and that an appellate court is not to disturb such a determination except in a plain case of abuse of discretion. *Meccano Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141 (1920); *Alabama* v. *United States*, 279 U. S. 229 (1929). Far from any abuse of discretion, the opinion and the findings of the district court amply justify interlocutory relief.

Every sound reason of public policy and private right called for the issuance of the preliminary injunction. First, none of the facts alleged in the complaint and in McLaurin's affidavit were in any way disputed by the Brotherhood. Second, the questions of law which are involved in this case have been definitely decided against respondent by this Court and the Fourth Circuit Court of Appeals. Third, the issuance of a preliminary injunction in this case is peculiarly justified since this is an action to enforce public as well as private rights and courts of equity "go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515, 552 (1937).

The invalidity of the Southeastern Carriers Conference Agreement of February 18, 1941 has been conclusively determined by the Supreme Court in the *Steele* and *Tunstall* cases, 323 U. S. 192, 323 U. S. 210. The attempted justification of its conduct by the Brotherhood in the *Tunstall* case has finally been found to be without substance by the Dis-

trict Court in Virginia (69 F. Supp. 826) and by the Circuit Court of Appeals (163 F. (2d) 289), and on December 15, 1947 this Court refused to review their determinations (332 U. S. 841). As has already been pointed out, there is nothing in the record to dispute the facts alleged in the complaint and McLaurin affidavit which bring the case at bar squarely within the earlier rulings. Petitioners are suffering clear irreparable injury in being deprived of the job assignments to which their seniority rights entitle them. The railroads took no appeal and there is no possible reason why, pending the determination of this action the outcome of which is enshrouded in so little doubt, the Brotherhood should be permitted to continue its discrimination against petitioners and their class and reap a new harvest of fruits of its unlawful conduct. See pp. 37 to 40, *infra*.

Even if this preliminary injunction could be said to disturb the *status quo* in the sense that it prevents new discriminations against negro firemen, this would be no argument against the propriety of granting interlocutory relief in view of the compelling reasons outlined above. But in a real sense, the order of the district court preserves the *status quo*. It does not require the parties to undo past discriminations against negro firemen in the assignment of jobs. It only requires that in the future assignments of "runs" petitioners and their class be given the assignments to which their seniority entitles them. The order requires only that the normal seniority practices which the railroads have followed in the absence of discriminatory agreements and arrangements be followed in the future. The injunction, therefore, really preserves the *status quo* by preventing the infliction of additional irreparable injury upon petitioners and their class pending the final determination of this action.

The Brotherhood argued in the court of appeals "that the interlocutory relief granted below gives in major part the final relief requested" (p. 26, 29) and seemed to contend that this is an argument against the preliminary injunction. Respondent is wrong on its facts—the preliminary injunction is not the final declaration of rights requested; it does not restore any jobs, it does not order any payments for back wages, it does not prevent respondent from continuing to represent the entire class of firemen under the Railway Labor Act. All the preliminary injunction does is to prevent new discriminations on future job assignments during the course of a trial which respondent could long since have had upon a simple request to the district court.[10] If respondent seriously believes that the preliminary injunction gives in major part the final relief requested, it can mean only one thing—that whenever respondent is at last effectively enjoined from future discriminations, whether by temporary or permanent injunction, it will have to arrive at a fair settlement with the colored firemen it has betrayed these long years. Such an argument can hardly avail respondent in a court of equity.

III

Request for Ancillary Relief: Reinstatement of Preliminary Injunction

Petitioners respectfully urge this Court, if it should determine to send the case back to the court of appeals for action on any of the three questions discussed under Point II, to

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[10] The district court stated, after granting the preliminary injunction, that the case would be advanced for prompt trial upon application by any defendant (Transcript p. 189). The Brotherhood made no such application.

direct the court below to vacate the stay and reinstate the preliminary injunction during the pendency of the case there.[11] "This Court has power not only to correct errors in the judgment entered below, but, in the exercise of its appellate jurisdiction, to make such disposition of the case as justice may now require." *Dorchy* v. *Kansas*, 264 U. S. 286, 289 (1924). See also *Ex Parte Republic of Peru*, 318 U. S. 578, 582-586 (1943); *Villa* v. *Van Schaick*, 299 U. S. 152, 155 (1936); *Patterson* v. *Alabama*, 294 U. S. 600, 607 (1935); *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21 (1918). Unless this Court grants this ancillary relief, petitioners may be subjected to an additional long delay in the court of appeals during which more and more colored firemen will lose their hard-earned positions on the southeastern railroads and the ultimate judgment will be a hollow victory.

Petitioners' bill of complaint and motion for a preliminary injunction were filed on October 27, 1947—nearly two years ago. The complaint and the affidavit in support of the motion for preliminary injunction declare that the negro fireman's job and seniority rights are matters of life and death to him (R. 30); that the negro fireman cannot develop new skills and has no financial means of supporting himself and his family during this extended litigation (R. 30-31); that as Diesel engines replace steam power on the southeastern railroads, more and more negro firemen are being displaced or demoted unlawfully and their complete elimination from their time-honored jobs as locomotive firemen is inevitable (R. 30). The affidavit then prophetically states (R. 30-31):

> "In all Court actions heretofore brought to enjoin the unlawful practices here complained of, the defend-

[11] Of course, if this Court resolves all the questions dealt with earlier in the brief, it will not be necessary to consider this point; it is presented

ants have entered dilatory pleas and motions and have resisted all efforts to bring the issues to early determination. It is to be anticipated that similar moves will be made in this action. The passage of time necessary before there can be a final hearing and determination in this action will bring about the displacement or demotion of many of these plaintiffs and ultimate judgment in their favor will be a hollow victory. * * * Unless the enforcement of the said agreements and the practices thereunder are enjoined pending the final hearing in this action, irreparable injury and loss of the means of livelihood will be suffered by many of the plaintiffs and other Negro firemen similarly situated."

On December 3, 1947, after hearing testimony and argument, the district court found that the Brotherhood "is continuing and threatens to continue * * * to deny them (colored firemen) preferred runs on Diesel locomotives and otherwise to which their seniority entitles them, and in like manner to displace and discriminate against other Negro firemen employed by the said railroads on whose behalf these plaintiffs sue" (R. 68). The district court therefore ruled that "a temporary injunction should issue so that pending the final hearing and determination of this action no further injury should be inflicted upon these plaintiffs or other Negro firemen employed by the said railroads on whose behalf plaintiffs also sue." (R. 69.) Despite these findings, not controverted by the Brotherhood, the court of appeals immediately vacated the preliminary injunction (R. 81, 82), thereby permitting nearly two years of additional discriminations.

The factual allegations in the bill of complaint and McLaurin affidavit and the district court's findings are borne out by continued displacements of colored firemen since

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only in the event that this Court should hold that venue is properly laid in the District of Columbia and also should decide not to consider and resolve the questions dealt with under Point II above.

the preliminary injunction was set aside by the court of appeals. The Brotherhood will not be able to deny that additional colored firemen have lost their hard-earned positions throughout 1948 and 1949 and even since this Court granted certiorari in this very case. The question presented here is whether this discrimination should be allowed to continue while the matter is pending further before the court below. For the following reasons we urge that the Brotherhood's discriminatory practices have already been too long tolerated:

1. Five years have elapsed since this Court held in the *Steele* and *Tunstall* cases that the Brotherhood was acting in violation of the Railway Labor Act and that its discrimination against negro firemen based upon their race was "invidious" as well as "illegal." "The Brotherhood and the railroads which have cooperated with it—whether willingly or not—have completely ignored and disregarded the Supreme Court's ruling. They have continued to go their own way without paying any attention to the law of the land as it has been applied to the very contract here in issue by the highest tribunal." *Memorandum of the United States in the District Court.*

2. Petitioners' complaint and motion for preliminary injunction are an effort to enforce the *Steele* and *Tunstall* rulings in a single lawsuit. The Brotherhood, in opposing the motion, filed no affidavit or other evidence in the district court challenging any of the facts set forth by petitioners in their complaint and affidavit. Its sole defense has been its effort to avoid the jurisdiction of the courts below as it has done in all the other suits that have been brought to vindicate the rights of the colored firemen.[12]

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[12] See Appendix to Memorandum for the United States as Amicus Curiae filed in this case December 1948 in support of the petition for certiorari.

Thus, on the merits of the case, the facts are not controverted, and, as the district court stated, "no doubtful question of law is involved" (R. 65).

3. The preliminary injunction is necessary to protect the public interest in the policies prescribed by the Railway Labor Act. See *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 552 (1937). As the Government stated to the district court in filing its memorandum in support of the preliminary injunction, "there is a public as well as a private interest in this litigation which requires that the defendants' unlawful discriminatory conduct be restrained at the earliest moment."

4. No relief can be expected from the court of appeals. As was pointed out earlier (p. 7, *supra*), that court's stay of the preliminary injunction was granted over petitioners' opposition and even petitioners' motion for an early argument was refused. The delay of nearly a year in the court of appeals, after staying the preliminary injunction, was a misapplication of judicial power.

5. The continued displacement of colored firemen in the very teeth of the *Steele* and *Tunstall* rulings and the district court's findings in this case is an unconscionable abuse of equity and justice. Unless the preliminary injunction is reinstated promptly, the Brotherhood of Locomotive Firemen and Enginemen may yet win their war of delay and attrition and gain final success in their efforts to flout the decisions of this Court.

Conclusion

Venue was properly laid in the District of Columbia. In the exercise of a sound discretion, this Court should resolve the three other objections to the preliminary injunction raised by the Brotherhood; on examination these objections

prove wholly without merit. If, however, this Court should remand the case to the court of appeals for a decision on these questions, it is respectfully submitted that equity and justice demand the vacation of the stay and the reinstatement of the preliminary injunction while these questions are being determined by the court below.

Respectfully submitted,

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SEPTEMBER, 1949.

APPENDIX

28 U. S. C. § 112. Federal Venue Statute.[13]

"(a) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

28 U. S. C. § 1406. Cure or waiver of defects.

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

§ 11-306—D. C. Code. General jurisdiction.

"Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

§ 11-308—D. C. Code. Actions—Limitation upon—Inhabitants or sojourners in District of Columbia.

"No action or suit shall be brought in the District Court of the United States for the District of Columbia

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[13] 28 U.S.C. § 1391, the revised federal venue statute, contains no relevant changes.

by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided."

Constitution: Article I, Section 8, Clause 17.

"The Congress shall have Power . . .

Cl. 17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—"

Constitution: Article III, Section 1.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Constitution: Article III, Section 2.

"Cl. 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Rule 23. Federal Rules of Civil Procedure. Class Actions.

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Rule 4(d)(3). Federal Rules of Civil Procedure. Service.

"Service shall be made as follows:

"(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

Norris-LaGuardia Act (Act of March 23, 1932, 47 Stat. c. 90; 29 U. S. C., §§ 101-115):

"102. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are

herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

"103. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act [§ 102 of this title], is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

"Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

"(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

"(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

"104. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act [§ 103 of this title];

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act [§ 103 of this title].

"105. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act [§ 104 of this title].

"107. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect——

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. * * *

"108. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 149

No. ~~452~~ 16

LEROY GRAHAM, ET AL.,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION

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Opinions Below

The opinion of the District Court granting petitioners a preliminary injunction is reported in 74 F. Supp. 663. The opinion of the Court of Appeals (R. 73) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on October 26, 1948 (R. 80). The jurisdiction of this Court is

invoked under Section 240(a) of the Judicial Code, as amended (now 28 U. S. C. Sec. 1254).

Questions Presented

1. Whether this Court should exercise its discretionary jurisdiction to review an apparently correct decision of the Court of Appeals for the District of Columbia Circuit holding the purely local venue statute inapplicable to a case cognizable under the District Court's Federal jurisdiction and whose entertainment in that Court is prohibited by the terms of the Federal venue statute because the defendant is not an inhabitant of the District of Columbia. Whether in any event the decision of the Court of Appeals is not so clearly correct as not to warrant review.

2. Whether the class action device can be used to evade the Federal venue statute's prohibition against suing a non-inhabitant association that is suable as an entity in the district of its inhabitancy; if so whether the Court below erroneously found the named members of the class to be not adequately representative.

3. Whether Section 301(c) of the Labor-Management Relations Act, 1947, has any application to a railway labor organization engaged exclusively in representing employees subject to the Railway Labor Act in dealings with employers subject to the Railway Labor Act.

Statutes Involved

The pertinent provisions of the statutes involved in this case are set out in the Appendix.

Statement

The petitioners, 21 non-residents of the District of Columbia, instituted a proceeding in the District Court of the

United States for the District of Columbia alleging jurisdiction in that Court because the proceeding was one arising under the Constitution and laws of the United States (R. 1, 14) Named as defendants were three railroads, the Brotherhood of Locomotive Firemen and Enginemen, two local lodges of the Brotherhood and certain local officials of those local lodges. The local lodges named are situated in the District of Columbia but are not claimed to have had any participation in or connection with the acts complained of. The Brotherhood of Locomotive Firemen and Enginemen is an unincorporated association maintaining its headquarters and principal office in Cleveland, Ohio (R. 41).

The complaint alleged that the defendants were engaged in certain practices which were alleged to be illegally discriminatory against the plaintiffs, and sought a preliminary injunction, a permanent injunction and damages.

Prior to answering, the Brotherhood moved to dismiss on several grounds including the ground of improper venue. The District Court overruled these motions and granted a preliminary injunction (R. 66). The Brotherhood thereupon petitioned the Court of Appeals for the District of Columbia Circuit for the allowance of a special appeal under D. C. Code, Section 17-101, which was allowed (R. 73).

Upon the appeal the Brotherhood urged reversal upon the several grounds upon which dismissal had been sought and the preliminary injunction opposed in the District Court. The Court of Appeals, however, found it unnecessary to pass upon any of the issues other than that of improper venue. (R. 74) It held that venue was mischosen because the Brotherhood is not an inhabitant of the District of Columbia and that the action could not be sustained by treating the Brotherhood as a class. It is only that determination of venue which the petition seeks to review.

There is apparently no claim that the Brotherhood is an inhabitant of the District of Columbia or that if the Federal venue statute applies it is subject to suit in the District of Columbia other than through the device of a class action or by virtue of Section 301(c) of the Labor-Management Relations Act, 1947.

Argument

The sole basis of the decision below, and the sole question before this Court on the petition for certiorari, involves the applicability of the local venue statute of the District of Columbia (D. C. Code, Sec. 11-306, 308) to these proceedings.[1] That statute is exclusively a local statute, in force only in the District of Columbia, and governing no courts other than those in the District of Columbia. Under the decisions of this Court, and under subsection 5 of rule 38, such decision of the Court of Appeals for the District of Columbia Circuit will not ordinarily be reviewed. If the Federal venue statute (28 U. S. C., Sec. 112) is applicable, the proceedings against the respondent, the Brotherhood of Locomotive Firemen and Enginemen, were improperly initiated in the District of Columbia. If the local venue statute were applicable, one interpretation of the facts might have made venue proper in the District of Columbia, but the Court of Appeals found the local venue statute inapplicable.

All the discussion of petitioners concerning the merits of the controversy, and the contents of affidavits and memoranda concering the merits, is thus wholly irrelevant. And such discussion is predicated upon an *ex parte* statement of the facts pertaining to the controversy. The issues now

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[1] In the Court below, respondents urged three additional grounds for reversal but the Court found it unnecessary to consider these additional grounds. In the event this case is reviewed by this Court, respondents will urge those additional grounds for affirmance.

involved in this proceeding were determined by the courts below before the answer of respondents, controverting many of the allegations, and casting a different light upon others, was filed.

I. The Decision of the Court of Appeals Holding the Local Venue Statute Inapplicable was Clearly Correct. In Any Event, It Is a Question of Local District of Columbia Law Normally to be Finally Decided by the Court of Appeals.

The petitioners argue in substance that in any proceeding brought in the United States District Court for the District of Columbia venue is properly in the District of Columbia if the case falls either within the Federal venue statute or within the local District of Columbia venue statute. They argue that the unanimous decision of the Court of Appeals in this case, holding the local venue statute inapplicable to a proceeding cognizable by the District Court sitting as a Federal court, conflicts with the decisions of this Court. But all the cases cited for such proposition are authority only for the proposition that the United States District Court for the District of Columbia has both Federal and non-Federal jurisdiction, and are not pertinent to questions of venue.

It is apparently conceded that if the Federal venue statute is applicable to this proceeding against the Brotherhood, venue does not lie in the District of Columbia. The Brotherhood is an unincorporated association which has its headquarters and principal place of business in Cleveland, Ohio. The only cases which counsel have discovered dealing explicitly with proper venue for a suit against an unincorporated association are this case decided in the Court of Appeals for the District of Columbia Circuit and

Sperry Products, Inc., v. *Association of American Railroads* decided by the Court of Appeals for the Second Circuit in 132 F. (2d) 408 (1942). The *Sperry* case, like this one, held that under the Federal venue statute venue in an action against an unincorporated association as an entity lies only in the district in which it is an inhabitant, and that it is an inhabitant only of the district in which is located its principal place of business. So far as counsel has been able to discover, no case has held to the contrary.

The jurisdictional allegations of the complaint invoked the jurisdiction of the District Court on the ground that the action arises under the Constitution and laws of the United States. (R. 1, 14.) The Court below held that in an action cognizable in the Federal courts and brought in the District Court for the District of Columbia, venue lies in the District of Columbia only under the Federal venue statute. There is apparently no disagreement that the Federal venue statute does not permit this proceeding against the Brotherhood as a suable entity. In finding that the local venue statute cannot be applied to such a situation, the Court of Appeals was passing upon a purely local question under a purely local statute. It is settled by the decisions of this Court that only in exceptional circumstances will such a determination by the Court of Appeals for the District of Columbia be reviewed by this Court, and in this case no exceptional circumstances are indicated. *Fisher* v. *United States*, 328 U. S. 463; *Busby* v. *Electric Utilities Employees Union*, 323 U. S. 72; *District of Columbia* v. *Pace*, 320 U. S. 698, 702; see *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285; cf. *United Surety Co.* v. *American Fruit Products Co.*, 238 U. S. 140; *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491.

Moreover, the unanimous decision below was a correct determination of the applicability of the local venue statute

to this proceeding. Of course, the District Court exercises both Federal jurisdiction under Article III of the Constitution and jurisdiction as a local court under Article I, but it cannot exercise both simultaneously in the same cause nor select the capacity in which it chooses to act. In *O'Donoghue* v. *United States*, 289 U. S. 516, this Court held that when the United States District Court for the District of Columbia exercises Article III judicial power, the exercise of such power cannot be affected by local legislation. See particularly page 546. Of course, the local venue statute is local legislation. It is clear that Article III judicial power extends to this controversy, and therefore we cannot look to local legislation to see whether venue lies in the District Court in this action. Since the Federal venue statute prohibits this type of suit in a Federal District Court in a district in which the defendant is not an inhabitant, to hold that a non-inhabitant of the District of Columbia may be sued in the United States District Court for the District of Columbia under the local venue statute in a case cognizable in Article III courts, would hold in substance, under the *O'Donoghue* case, that the District Court is not an Article III court.

The *O'Donoghue* case involved the question whether the District Court for the District of Columbia was a court established under Article III, so that the limitations of that Article with respect to the tenure and compensation of judges were applicable. The majority held that it was established both under Article III and Article I. The dissenting opinion urged that it was exclusively an Article I court, established pursuant to the power of Congress to provide for the government of the District of Columbia. In denial of that Court exercising Article III power the dissenting Justices showed that every power vested in the Court could be vested in it as an Article I court, therefore

in everything it did it could be acting as an Article I court, and therefore there was no need to look to Article III. It was apparently in an effort to overcome the force of that argument that the majority stated that when the District Court is exercising judicial power in a case cognizable under Article III it is exercising judicial power conferred under that Article, and such exercise is not affected by legislation pertaining to the court as a local court. In the words of this Court (at p. 546):

> "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior Federal courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior Federal courts elsewhere."

The question then becomes, is this cause cognizable in a court established under Article III? If so, the entertaining of this case is unaffected by local legislation. Clearly this cause is cognizable in the Federal courts established under Article III, and just as clearly sec. 11-306 of the D. C. Code, upon which appellees rely, is local legislation. Accordingly, we may not look to that section to determine whether venue lies in the District of Columbia, but may properly look only to the Federal venue statute. Otherwise, the purely local statute would be permitted to override the specific prohibition in the Federal venue statute against suing a non-inhabitant of the District in a Federal District Court.

The petitioners are concerned that the holding below will result in plaintiffs in the District of Columbia being able to sue under only one venue statute in certain causes of action, while plaintiffs elsewhere may have a choice of two venue statutes in cases that may be brought either in the Federal courts or in State courts. We fail to perceive the relevance of this, so long as an adequate forum is presented and a reasonable venue statute is enacted. And incidentally, not one of the twenty-one petitioners, plaintiffs below, who are so concerned with the rights of residents of the District of Columbia, is a resident of the District of Columbia.[2]

II. The Court of Appeals Correctly Decided that This Case Could Not Be Maintained as a Class Suit and Correctly Found That the Named Representatives Were Not Truly Representative of the Alleged Class.

The petitioners seek to sustain venue also on the ground that the proceeding was a class suit in addition to being a suit against the Brotherhood as a suable entity, and that since the named members of the alleged class reside in the District of Columbia venue properly lies in the District of Columbia. They assert that the decision of the Court below in this case conflicts with the decision of the Fourth Circuit in *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 148 F. (2d) 403. There are three basic errors in any such contention.

A. The *Tunstall* case in the Fourth Circuit had nothing whatever to do with venue. The only discussion in that case concerning a class suit pertained to the question of whether there had been proper service of process for such a suit.

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[2] Seven are residents of Florida, six of North Carolina, four of Virginia, two of Georgia, and one each of South Carolina and Mississippi. R. 9-13.

B. The Court below held that a class suit was not properly brought because the individuals named as representatives of the class were not in fact representative of the class for the purposes of this litigation. The District Court made no finding that the named members of the class were properly representative. The Court of Appeals held that such a finding could not be made. In the *Tunstall* case, to be sure, service of process was sustained by treating the case as a class action, but in that case the local members named as representatives of the class were governed by the collective bargaining agreement under attack, and were the very persons who would receive the job assignments to which the members of the plaintiff class claimed they were entitled. Here we have no such situation, and on the basis of these different facts the Court below distinguished the *Tunstall* case. It is not alleged that any of the members of the local lodges named in this case are employed on any of the railroads named as defendants in the proceeding brought in the District Court, and in fact none of the employees of any of those railroads is a member of or is eligible for membership in these local lodges. (R. 52). Thus the local defendants are not governed by and have no interest in the contracts under attack, and therefore are not in a position to defend the interest of those who do have an interest in those contracts.

But, say the petitioners, the question whether the members of the class sued will fairly represent the interest of the absent members does not turn on whether those joined have participated as fully as the others in the acts complained of, and that the question whether the named defendants are truly representative is not determined by technical niceties. In general, we would have no quarrel with such a proposition. But the difficulty here is that the named defendants did not participate at all and have no interest in

the acts complained of, and are unfamiliar with the allegedly wrongful contracts and the situation that gave rise to them. To ask them to defend conduct with which they are totally unfamiliar and in which they have no interest would be the clearest abuse of the class action procedure.

C. In this case, the Brotherhood was sued as a suable entity and its members were sued as a class. A class suit is improper where an unincorporated association is sued in its common name. *Sperry Products, Inc.* v. *Association of American Railroads, supra*, at p. 412. This is obviously sound. This readily appears when we recollect why class suits are permitted at all. Class suits are permitted when the parties are so numerous that it is impractical to bring them all into court. Indeed, the Federal Rules limit the use of class actions to cases where such a situation in fact exists. F. R. C. P. 23(a). In such a situation a few members fairly representative of the class are selected to represent the class. But when the members of the class are an association and are made suable as such, the necessity of permitting a class suit in such situation disappears. Thus the *Sperry* case properly held that where an unincorporated association is suable in its common name its members cannot be sued in a class suit. In the instant proceeding not only was the unincorporated association suable in its common name but it was in fact sued in its common name. In such a situation, to permit a class action also against the members of the association in the very same proceeding carries the use of the class action procedure beyond its legitimate purpose, and utilizes it simply as an evasion of the federal venue statute's prohibition against suing the non-inhabitant association in this district.

III. Section 301(c) of the Labor-Management Relations Act, 1947, Has No Possible Relevance to this Proceeding

The petitioners complain that the decision below *sub silentio* overruled their contention that venue in this proceeding lies in the District of Columbia under Section 301(c) of the Labor-Management Relations Act, 1947.

This contention was made for the first time in petitioners' brief in the Court of Appeals. In the Brotherhood's reply brief in that Court this contention was characterized as "either frivolous or a careless afterthought." The petitioners *sub silentio* concurred in that characterization, for they never again mentioned it during the course of an extended argument in the Court of Appeals. The Court of Appeals properly ignored it.

It is now apparently revived because of a patently erroneous decision of the United States District Court for the District of Columbia in *United States* v. *Brotherhood of Locomotive Engineers, et al.*, 79 Fed. Supp. 485.[3] It is abundantly clear that Section 301(c) of the Labor-Management Relations Act has no applicability to this case. That section provides that a "labor organization" may be sued in any district in which its agents represent "employee" members. But Section 501(3) of the same Act provides that whenever used in the Act the terms "employer," "employee," and "labor organization" "shall have the same meaning as when used in the National Labor Relations Act as amended by this Act." Section 2(5) of the National Labor Relations Act as amended defines the term "labor organization" so as to require any organization falling within its terms to be one in which "employees" as defined in that Act participate and which exists for the purpose, in whole or in part, of dealing with "employers" as defined

[3] That erroneous decision is now pending in the Court of Appeals for the District of Columbia Circuit, on appeal.

in that Act. The terms "employer" and "employee" are in turn defined by Section 2(2) and (3) specifically to exclude from the term "employer" any person subject to the Railway Labor Act and from the term "employee" any individual employed by such a person. Obviously, therefore, Section 301(c) of the Labor-Management Relations Act cannot confer venue since the Brotherhood neither has its principal office in the District of Columbia nor is it engaged there in representing "employees" as that term is defined. Further, since "employees" as defined do not participate in it and it does not deal with "employers" as defined it is not a "labor organization" as that term is defined.

In reviving this argument, the petitioners make two points, neither of which has any validity. They point out that Section 212 of the Labor-Management Relations Act exempted from Title II of that Act any matter subject to the provisions of the Railway Labor Act. They argue from that that Section 212 would have been superfluous if Section 501(3) meant what it clearly said, and infer that it therefore had no meaning. There is no merit to such argument, for Title II contains provisions whose scope is not dependent upon the terms "employer," "employee" and "labor organization." It was thus necessary in that Title specifically to provide that the Title should not be applicable to matters subject to the Railway Labor Act, because the definitions in Title V, even though applicable to Title II, would not adequately limit Title II. The scope of Title III, on the other hand is wholly dependent upon the meaning of the terms "employer," "employee" and "labor organization," and hence no provision beyond the definitions is necessary to effect complete exclusion.

The other argument of petitioners in reviving this contention asks this Court, in substance, to take judicial notice

of political activities allegedly engaged in by the railroad labor organizations and the alleged reasons that prompted such alleged activities. We submit that such matters are hardly appropriate items of judicial notice. And incidentally, it may be observed that Section 304 of the Labor-Management Relations Act rewrites a section of the Corrupt Practices Act and hence the question whether the provisions of Section 501(3) of the Labor-Management Relations Act remove a railway labor organization from the provisions of the amended Corrupt Practices Act, involves issues that in no wise present themselves when one concludes that Section 501(3) definitely does remove railway labor organizations from Section 301.

Finally, the petitioners are critical of the action of the Court of Appeals in directing a transfer of the case to the Northern District of Ohio pursuant to 28 U. S. C., Section 1406(a). Apparently no practice has yet developed among the Circuit Courts of Appeal as to whether in cases where those Courts find venue mischosen they will direct a transfer or remand to the District Court for a determination of the proper district, if any, to which transfer should be made. It is clear, however, that this action of the Court of Appeals can in no wise prejudice the petitioners even if it be deemed not the best practice. It is clear from the record that the Northern District of Ohio is the proper venue for a suit in the Federal courts against the Brotherhood. There is no other district to which this case could properly be transferred. If the petitioners are correct in their apprehension that jurisdiction of railroad defendants could not be obtained in that district, then the only alternative for the Courts of the District of Columbia would be to dismiss the action. A direction to transfer when a dismissal would have been in order cannot possibly prejudice the petitioners. Upon the transfer, opportunity will necessarily be afforded for a determination whether the

railroad defendants are suable in the Northern District of Ohio, and if not whether they are indispensable parties. Neither of these issues was raised or determined in this proceeding. No possible contention of petitioners is foreclosed.

Conclusion

The decision of the Court below is clearly correct, and in any event, its determination concerning the applicability of the local venue statute is within the sphere in which the determination of the Court of Appeals is normally treated as final. Likewise the determination of the Court of Appeals that certain named defendants are inadequately representative of the Brotherhood for purposes of maintaining this suit as a class suit is not one calling for review by this Court. Furthermore, the conclusion against permitting the maintenance of this suit as a class suit is squarely supported by the holding of the Second Circuit in *Sperry Products, Inc.* v. *Association of American Railroads, et al.*, 132 F. (2d) 408 (1942). The petitioners' effort to invoke Section 301(c) of the Labor-Management Relations Act, 1947, is so obviously contrary to the specific limitations of that Act as not to warrant consideration by this Court. It is therefore respectfully submitted that the petition should be denied.

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APPENDIX

28 U.S.C. § 112. Federal Venue Statute.*

"(a) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

28 U.S.C. § 1406. Cure or waiver of defects.

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall transfer such case to any district or division in which it could have been brought."

§ 11-306—D. C. Code. General jurisdiction.

"Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

§ 11-308—D. C. Code. Actions—Limitation upon—Inhabitants or sojourners in District of Columbia.

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* This brief, like the petition and the opinion of the court below, refers throughout to the statute as phrased when suit was filed and at the time of the District Court decision. The Court of Appeals noted the fact that this section was rephrased and codified as 28 U.S.C. Sec. 1391(b) effective September 1, 1948, but found no substantive change (R. 75 n. 2) and this conclusion is undisputed.

"No action or suit shall be brought in the District Court of the United States for the District of Columbia by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided."

Constitution: Article I, Section 8, Clause 17.

"The Congress shall have Power . . .

"Cl. 17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—"

Constitution: Article III, Section 1.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Constitution: Article III, Section 2.

"Cl. 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State,

or the Citizens thereof, and foreign States, Citizens or Subjects."

Federal Rules of Civil Procedure.

"Rule 23. Class Actions.

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The Labor Management Relations Act, 1947 (Public Law No. 101, Chapter 120, 80th Cong., 1st Sess.), including the National Labor Relations Act as amended:

"Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * * *

"Sec. 2. When used in this Act—

* * * * * * *

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the

benefit of any private shareholders or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricutural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * * * *

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * * * *

"Sec. 301. (c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization main-

tains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

• • • • • • •

"Sec. 501. When used in this Act—

• • • • • • •

"(3) The terms 'commerce', 'labor disputes', 'employer', 'employee', 'labor organization', 'representative', 'person', and 'supervisor' shall have the same meaning as when used in the National Labor Relations Act as amended by this Act."

No. 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

LEROY GRAHAM, ET AL., *Petitioners*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court granting the preliminary injunction is reported in 74 F. Supp. 663. It appears also in the record, pp. 62-6.

The opinion of the Court of Appeals has not yet been reported. It appears in the printed record, pp. 73-9.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 26, 1948. R. 80. The petition for a writ of certiorari was filed on December 7, 1948, and was granted on June 27, 1949. R. 84. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (now 28 U.S.C., Sec. 1254).

QUESTIONS PRESENTED.

1. Whether in a case brought in the United States District Court for the District of Columbia as a case arising under the Constitution and laws of the United States, venue was properly laid in the District of Columbia under the local venue statute although the federal venue statute prohibits the suit in that district.

2. Whether the class action device may be used to avoid the federal venue statute's prohibition against suing a non-inhabitant association that is suable as an entity in the district of its inhabitancy.

3. Whether a class action predicated upon the invalidity of collective bargaining agreements can be brought against individuals who the Court below found are not affected by or interested in or familiar with the agreements or their attendant circumstances and thus do not adequately represent the defendant class.

4. Whether this case involves or grows out of a "labor dispute" as defined in the Norris-LaGuardia Act; if so, whether that Act deprived the District Court of jurisdiction to issue a preliminary injunction in this case.

5. Whether the respondent has been served with process as required by Rule 4(d)(3) of the Federal Rules of Civil Procedure.

6. Whether the District Court may properly issue a preliminary injunction to change the *status quo* during the pendency of the action.

7. In the event this Court does not decide the question of whether the Norris-LaGuardia Act deprives the federal courts of jurisdiction to grant injunctive relief in this case and does not decide the question of whether respondent has been served with process, whether this Court should nevertheless order the preliminary injunction reinstated.

STATUTES AND RULES INVOLVED.

The pertinent provisions of the statutes and rules involved in this case are set out in the appendix.

STATEMENT.

A. Petitioners' Complaint and Motion for Preliminary Injunction.

This case arose upon the complaint of Leroy Graham and twenty others against the Southern Railway Company, the Seaboard Air Line Railroad Company, the Atlantic Coast Line Railroad Company, the Brotherhood of Locomotive Firemen and Enginemen, certain local lodges of said Brotherhood, and certain local officials of said local lodges. The local lodges named are situated in the District of Columbia but are not claimed to have had any participation in or connection with the acts complained of. The Brotherhood of Locomotive Firemen and Enginemen is an unincorporated association maintaining its headquarters and principal office in Cleveland, Ohio. R. 41.

The plaintiffs are all locomotive firemen on railroads in the southeastern part of the United States. They allege certain practices by the defendants, asserted to be illegal, by which they are damaged, and specifically a certain agreement between the Brotherhood and the Southeastern Carriers Conference Committee entered into February 18, 1941. R. 2-14. The petitioners sought an order declaring their rights, injunctive relief, and damages.

Concurrently with the complaint plaintiffs filed a motion for a preliminary injunction to enjoin defendants from enforcing or countenancing the agreement of February 18, 1941, or any other agreement or practice which would have a similar effect upon plaintiffs; and enjoining defendant Brotherhood from purporting to act as bargaining representative of the craft of firemen so long as it does not fairly represent plaintiffs or discriminates against them with respect to conditions of employment. R. 22.

B. Proceedings in the District Court.

Defendant Brotherhood filed motions to dismiss on several grounds including (1) improper venue, and (2) that the Brotherhood was not served with process. R. 39. All the motions to dismiss were denied. R. 45, 59-62.

On December 3, 1947, the District Court entered the order (R. 66) enjoining the Brotherhood and the railroad defendants from carrying out the agreement of February 18, 1941, or any similar agreement or understanding, and enjoining the Brotherhood from inducing the said railroads from taking any action with respect to seniority rights to assignments thereafter made which would change practices with respect to seniority rights to assignments as firemen followed by said railroads prior to the agreement of February 18, 1941, or any similar agreement.

The Court denied a stay of the injunction pending appeal but did grant a brief stay to give the Brotherhood an opportunity to apply to the Court of Appeals for a stay. R. 72.

C. Subsequent Proceedings.

On December 8, 1947, respondent filed in the Court of Appeals a motion for stay pending petition for allowance of special appeal, and pending appeal.

By stipulation of all counsel the Court treated the motion for stay as a petition for allowance of special appeal and for an order maintaining the *status quo* pending decision thereon. On December 9, 1947, it entered an order staying the injunction of the District Court pending final action on the petition for allowance of special appeal. R. 81. On January 5, 1948, the special appeal was allowed, and the stay of the preliminary injunction continued pending disposition of the appeal. R. 82.

On the appeal the Brotherhood urged reversal upon the several grounds upon which dismissal had been sought and the preliminary injunction opposed in the District Court. The Court of Appeals, however, found it unnecessary to

pass upon any of the issues other than that of improper venue. R. 74. On October 26, 1948, the Court of Appeals reversed the action of the District Court on the ground that venue was mischosen because the Brotherhood is not an inhabitant of the District of Columbia and that the action could not be sustained by treating the Brotherhood as a class because of inadequate representation of the class. R. 73, 80.

On December 7, 1948, petitioners asked for a writ of certiorari which was granted on June 27, 1949.

SUMMARY OF ARGUMENT.

I. It is not disputed that this case falls literally within the Norris-LaGuardia Act's definition of a controversy involving or growing out of a labor dispute; in such cases the federal courts are deprived of jurisdiction to issue injunctions except under conditions not even purportedly met in this case. But petitioners contend that there is an implied exception to the Act in the case of a controversy involving a violation of another later federal statute. The terms of the Act contain no such exception and its legislative history shows that such an exception was specifically not intended. The citations of petitioners in support of such an exception fail to sustain the contention. *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, sustained an injunction but an analysis of the case, whether from the point of view of whether it fell within the terms of the Act or from the point of view of whether the conditions of the Act were complied with in issuing the injunction, shows no exception to the plain provisions of the Act. It shows that the controversy did not arise from a labor dispute as defined in the Act and that even if it did the conditions of the Act were complied with at least to the extent that such question was raised. In *Tunstall* v. *Brotherhood*, 323 U.S. 210, this Court held only that the complaint stated a cause of action; the question of what relief would be available, and the question of the effect of the Norris-LaGuardia Act on

the relief that would be available, were not raised, considered, or decided.

II. Congress has provided that in the ordinary civil action cognizable in the federal courts and not founded on diversity of citizenship a defendant may be sued only in the district of which he is an inhabitant. Since respondent maintains its headquarters and principal office in Cleveland, Ohio, it is not an inhabitant of the District of Columbia within the meaning of that statute. *Sperry Products, Inc.* v. *Association of American Railroads*, 132 F. (2d) 408 (C.A. 2, 1942). The jurisdiction of the District Court was invoked on the ground that the action arises under the Constitution and laws of the United States. R. 1, 14. When the United States District Court for the District of Columbia entertains an action cognizable by it as a federal court it is governed by federal and not local legislation. The federal venue statute therefore requires dismissal of this action.

The petitioners may not evade the plain prohibition of the federal venue statute by the device of a class suit naming inhabitants of the District of Columbia as alleged representatives of the class. The respondent is a suable entity, and a class suit is not permissible against a suable entity. Moreover, as the Court below found, the local inhabitants of the alleged class are not representative of the class for the purposes of this litigation since they are not interested in or affected by it and are unfamiliar with the merits of the controversy.

III. The respondent has not been served with process as required by the Federal Rules of Civil Procedure because service has not been had upon any of the individuals described in Rule 4(d)(3). The authorities cited by petitioners for the proposition that service upon officers of local lodges constitutes service upon the respondent have no bearing upon that proposition, and the cases that are in point hold to the contrary. Nor can service upon the

local lodge officers bring the Brotherhood into court as a class, since as we show in point II, the defendant class action device may not be used against a suable entity and the named individuals are not representative of the alleged class for the purposes of this case.

IV. The preliminary injunction would require a radical change in long-established practices and give petitioners privileges as employees they have not had before. An injunction *pendent lite* may not be used for such purpose but only to maintain the *status quo*.

V. The petitioners request interlocutory relief of this Court in the event the Court does not pass upon points I, III, and IV but remands to the Court below for consideration of those points. Such relief should not be granted since the statement upon which the need for such relief is predicated has no basis in the record or in fact. And in the absence of a finding that there is jurisdiction to grant such relief and that respondent has been brought into court, such relief would be improper.

ARGUMENT.

I. Under the Norris-LaGuardia Act, the District Court did not have Jurisdiction to Issue the Preliminary Injunction.

The Norris-LaGuardia Act (29 U.S.C., Secs. 101-15) deprived the District Court of jurisdiction to issue an injunction in this case. It apparently is not denied that this case falls within the literal provisions of that Act. The argument that that Act is inapplicable to this situation is predicated upon a compounding of untenable implications.

Section 1 of the Norris-LaGuardia Act provides that no federal court shall have jurisdiction to issue an injunction "in a case involving or growing out of a labor dispute, except in strict conformity with the provisions" of the Act. *Lauf* v. *Shinner*, 303 U.S. 323. Here there was no pretense

of satisfying the conditions of the Act, and thus the sole question is whether this case involves or grows out of a "labor dispute" within the meaning of the Act.

Section 13(c) defines a "labor dispute" to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." This case is obviously such a controversy. The petitioners complain of the terms and conditions under which they are employed; they complain that the terms and conditions whereby they are limited by percentages in jobs to which they can be assigned, or are limited by other provisions, are improper.

It is thus plain from the simple language of the Act that this controversy is a labor dispute. Since Section 1 provides that no federal court shall have jurisdiction to issue an injunction in a case "involving or growing out of a labor dispute", we must determine whether this is a case "involving" or "growing out of" such a controversy.

Section 13(a) provides that a case involves or grows out of a labor dispute when it involves "persons who are engaged in the same industry, trade, craft, or occupation * * * or who are employees of the same employer * * * whether such dispute is (1) between one or more employers * * * and one or more employees * * * or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' * * * of 'persons participating or interested' therein * * *."

It should require no demonstration that this case involves or grows out of a labor dispute, for while it is necessary to meet only one of the above tests, this case meets each of them. Plainly the petitioners and the members of the re-

spondent are engaged in the same industry and even in the same craft, the petitioners and members of the respondent are employees of the same employer, and the dispute is both between one or more employers and one or more employees and is also between one or more employees and an association of employees. Moreover, the case involves competing interests in a labor dispute of "persons participating or interested" therein, for that term is defined in Section 13(b) to include a party "if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs * * * or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

It is thus abundantly clear that this case falls within the Norris-LaGuardia Act, for however viewed, and by whatever of several tests, the answer is the same: this case involves a labor dispute within the meaning of the Act. But if any doubt could remain, it is removed by the cases. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552; *Lauf* v. *Shinner*, 303 U.S. 323; *Fur Workers Union* v. *Fur Workers Union*, 70 App. D. C. 122, 105 F. (2d) 1, affd. 308 U.S. 522.

The *New Negro Alliance* case is particularly pertinent. It involved an effort by a Negro organization to compel a grocery chain to employ some Negro clerks, at least in stores located in colored neighborhoods. The grocery chain had a policy against employing Negro clerks. This Court, in overruling the Court below, held that such a dispute was within the Norris-LaGuardia Act. It should be remembered that the dispute in that case was not between employees on the one hand and the employer or other employees on the other hand, but between an employer on the one hand and on the other hand persons who wanted to become employees and an organization (not a labor organization) that wanted such persons to have the opportunity to become em-

ployees. But this Court held that the dispute involved terms and conditions of employment, was therefore a labor dispute, and that the District Court was therefore without jurisdiction to issue an injunction, stating (at p. 561):

> "There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color."

It would appear to be beyond dispute that if that case, involving discrimination against the hiring of Negroes, grew out of a controversy concerning terms and conditions of employment and was therefore a labor dispute, then certainly this case, involving alleged discrimination against Negroes after they become employees in the terms and conditions of their employment, must also arise from a labor dispute in which an injunction is prohibited except under prescribed conditions. But petitioners, relying on *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515, argue that the Norris-LaGuardia Act does not preclude injunctions to restrain violations of the Railway Labor Act, since the Railway Labor Act was amended after the enactment of the Norris-LaGuardia Act and thus its commands must be taken as *pro tanto* modifications of the earlier legislation. This argument, of course, assumes that petitioners are certain to prevail on the merits (since otherwise the Railway Labor Act can have no application), a position that respondents vigorously protest; but even making such assumption, the argument that injunctive relief is available is unsound.

It is well settled that implied repeals or amendments of statutes are to be found only in the event of utter inconsistency between the earlier and the later legislation, and then only to the extent of the irreconcilable conflict. *Wood* v. *22 Packages*, 16 Pet. 342, 363, 10 L. Ed. 987; *United States* v. *Borden*, 308 U.S. 188, 198-9; *United States* v. *24 Cans*,

148 F. (2d) 365 (C.A. 5, 1945); *McCarthy* v. *McCarthy*, 20 App. D.C. 195, 202.

No such conflict, nor indeed any conflict, can be found between the Railway Labor Act and the Norris-LaGuardia Act. There is no conflict in express terms. It should be remembered that until the decision in *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, it was not supposed that disputes regarding the actions of a craft representative in negotiating collective agreements on behalf of the craft presented justiciable questions. *Tunstall* v. *Brotherhood*, 148 F. (2d) 403. It is only by implication that limitations on the authority of a craft representative are found, and only by further implication that injunctive relief is found under any circumstances to be an available remedy for their enforcement. *Steele* v. *L. & N. R. Co.*, *supra*, at pp. 199-200. Thus the argument of implied *pro tanto* repeal in this case is based not on any express conflict in language, but seeks to find an implied repeal by virtue of impliedly available relief in appropriate cases for the enforcement of an implied provision. There is no reason whatever to imply the availability of such relief in cases where its availability is categorically denied by statute.

However, even apart from such considerations, but especially in the light of them, the *Virginian* case fails to substantiate petitioners' contentions. An injunction was issued in that case, but that case did not involve a "labor dispute" as defined in the Norris-LaGuardia Act. It involved a suit by the duly certified bargaining agent of the railroad's employees to compel the railroad to bargain with it, as required by the Railway Labor Act (45 U.S.C., Secs. 151-63). The employer in that case had refused to negotiate with the union or to talk with the bargaining representative. The union, recently certified as the bargaining agent, had requested negotiations for the purpose of entering into a contract. The case contains no suggestion that there had developed between the parties any difference of view as to what the terms or conditions of employment should be.

The employer's refusal to bargain was itself sufficient to preclude any such development. The dispute involved in that case was only the question whether the railroad was required to bargain with the union concerning terms and conditions of employment. And the employer did not dispute that the union represented the craft or class—an election and certification had settled that—so there was no dispute concerning the association or representation of employees in negotiating terms or conditions of employment.

The question in that case thus fell within none of the categories of "labor dispute" as defined in the Norris-LaGuardia Act, for it involved neither terms or conditions of employment nor the association or representation of employees in negotiating such terms or conditions. It thus has no bearing on a situation, like that involved in the instant case, where the very terms and conditions themselves are in dispute; in this case the petitioners are contending that they are entitled to more favorable terms and conditions and that some of the terms are improper. And it was one of the purposes of the Norris-LaGuardia Act to prevent the federal courts from settling terms and conditions of employment by injunction.

It should be observed also that it was not urged in the *Virginian* case, either in the briefs or in argument before this Court, that the controversy was not a "labor dispute" within the definition of the Act, nor did the Court consider such issue. S. Doc. 52, 75th Cong., 1st Sess.[1] The carrier argued only that certain terms of the injunction were prohibited; e. g., that the prohibition in Section 4(e) of an injunction against the giving of publicity to the facts of a labor controversy prohibited the enjoining of an employer from making certain statements to his employees, and that since Section 7 limited injunctions to acts specifically complained of and proven an injunction could only prohibit and a mandatory injunction was forbidden. These arguments,

[1] It is well settled that a decision of this Court is not to be regarded as precedent on an issue not raised or considered. *Ayrshire Collieries* v. *United States*, 331 U. S. 132, 137.

said this Court, were strained and unnatural constructions. And so they were. But such holding has no bearing on whether the controversy involved or grew out of a labor dispute.

Again, even if that case did involve a labor dispute within the definition of the Norris-LaGuardia Act, that Act would not have prevented the issuance of an injunction. The carrier contended that certain conditions upon which there would be jurisdiction to issue an injunction had not been met, and if we reject the "strained and unnatural" constructions upon which such contention was based then we find that the conditions were met and that therefore an injunction could issue even under the Act. However that case is viewed it is no indication that the instant controversy does not involve or grow out of a labor dispute or is not governed by the Norris-LaGuardia Act.

The *Virginian* case thus constitutes a holding only that a railroad employer can be required under the Railway Labor Act by mandatory injunction to bargain with the union in an effort to agree on what the terms or conditions of employment shall be; the case does not hold, and could not hold so long as the Norris-LaGuardia Act is law, that an injunction may be issued by a federal court to settle the terms and conditions of employment or the labor dispute itself. In this case the dispute is not as to the proper method or required method of trying to settle a labor dispute; here it is the labor dispute itself that is the controversy, and the injunction is sought to settle that dispute, and hence the *Virginian* case can have no application.

Moreover, Congress specifically did not intend to except from the Norris-LaGuardia Act injunctions against conduct in violation of other federal legislation. The Norris-LaGuardia Act itself makes no exceptions to the conduct that may not be enjoined in a labor dispute other than under the prescribed conditions. And its legislative history shows plainly that even if the conduct sought to be enjoined were in direct contravention of other Congressional enact-

ments an injunction to restrain such conduct would be subject to the provisions of the Act. A minority of the Senate Committee to which the bill was referred recommended its disapproval in part on the ground that it would protect a union from an injunction even against violating other federal statutes. S. Rpt. 163, pt. 2, 72nd Cong., 1st Sess., p. 9. To meet that objection, shared by others, an amendment was proposed on the floor of the House of Representatives to except from the provisions of the bill injunctions to restrain acts in violation of statute, but the proposed amendment was defeated. 75 Cong. Rec. 5507. In *Fur Workers Union* v. *Fur Workers Union*, 70 App. D. C. 122, 105 F. (2d) 1, affd. 308 U.S. 522, this Court affirmed without opinion a decision of the Court below that since the dispute between different groups of employees fell within the literal provisions of the Norris-LaGuardia Act, no injunction could properly issue no matter how illegal the purpose of the activity sought to be enjoined. See also *Lauf* v. *Shinner*, *supra*, and *Cole* v. *Atlanta Terminal Co.*, 15 F. Supp. 131 (D. C. N. D. Ga., 1936).

The petitioners argue also that this controversy does not fall within the Norris-LaGuardia Act because it is not the kind of controversy described in Section 2 of the Act declaring public policy. It need hardly be pointed out that the failure of the announced public policy of an Act to refer to unambiguous and explicit provisions in the Act does not remove such provisions from the Act, especially when such provisions are not in conflict with the announced public policy. Moreover, this Court has repeatedly held the Act to apply to controversies not described in the declaration of public policy. *New Negro Alliance* v. *Sanitary Grocery Co.*, *supra*, is a clear example of such a case, as is *Lauf* v. *Shinner*, 303 U.S. 323, where this Court said (at p. 330):

> "The Court of Appeals erred in holding that the declarations of policy in the Norris-LaGuardia Act and the Wisconsin Labor Code to the effect that employees are to have full freedom of association, self-organization, and designation of representatives of their own

> choosing, free from interference, restraint or coercion of their employers, puts this case outside the scope of both acts since respondent cannot accede to the petitioners' demands upon it without disregarding the policy declared by the statutes. * * * *We find nothing in the declarations of policy which narrows the definition of a labor dispute as found in the statutes. The rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined.*" (Emphasis supplied.)

Petitioners rely also on the circumstance that in *Tunstall* v. *Brotherhood*, 323 U.S. 210, the Norris-LaGuardia Act was not found to be pertinent. But such circumstance is necessarily without significance. The point was never raised by the parties nor mentioned by the Court. The case was defended on the ground that there were no limitations on the bargaining authority of a craft representative, and that therefore the complaint failed to state a cause of action. That contention was sustained in the lower courts. No attention was paid to the question of what remedy would be available if there were such legally enforceable limitations, and it is not until we reach the question of a remedy for the alleged wrong that the Norris-LaGuardia Act becomes applicable and prevents an injunction unless certain conditions are met. We cannot assume that the Court searched on its own initiative for arguments not raised that might be relevant to the relief that would be available, considered the Norris-LaGuardia Act, and then rejected it without mentioning it. Certainly when the point is raised it has as a minimum sufficient substance to require explanation if it is to be rejecteed. We submit that now that the point is raised it cannot be rejected.

But we need not speculate on the significance of the *Tunstall* decision on this point, for in an analogous situation this Court has expressly stated that it has no significance. *Ayreshire Collieries* v. *United States*, 331 U. S. 132, 137. In that case this Court held that the failure of one of the judges of a three-judge court to participate in the decision

rendered the judgment void, and that hence there was nothing to be appealed which this Court could consider. The Court's attention was directed to the fact that in an earlier similar situation it had exercised jurisdiction and entertained the appeal. In the earlier case the issue had not been raised or considered. This Court stated that in such circumstances the fact that the appeal was entertained is no basis for considering it as authoritative on the jurisdictional issue, since it is the firm policy of the Court not to recognize the exercise of jurisdiction as precedent where the issue was ignored.

Finally, the petitioners argue that the Norris-LaGuardia Act must be inapplicable because the circumstances of the dispute do not permit it to fulfill some of the prescribed conditions. Thus they show that they can make no showing of meeting the requirement of Section 7(e) that the officers charged with protecting the complainant's property are unable or unwilling to furnish adequate protection, since such a requirement is simply not applicable to the situation at bar.

The answer is simple. The Norris-LaGuardia Act was made law to prevent the issuance of injunctions in labor disputes except under prescribed conditions. One of those conditions is that violence exist or be threatened, against which there is inadequate protection. In the absence of such a showing, among others, an injunction is prohibited. It is somewhat astounding to find it argued that because petitioners cannot make one of the showings required by the Act before an injunction is possible that therefore the Act should not be applied.

But even if we assume that the Norris-LaGuardia Act did not intend to prohibit injunctions in all cases of labor disputes not involving violence, the petitioners' argument is unsound. Under such a view, obviously, the provisions having no applicability should not be applied. It would be just as sensible to argue that the Norris-LaGuardia Act is inapplicable to a situation existing outside city limits because Section 7 requires notice to the county and city of-

ficials. But Section 7 requires also that before an injunction can issue specific allegations of illegal conduct be proven in open court subject to cross-examination; Section 7(c) requires allegation and proof that the damage to complainant if an injunction is denied will be greater than the damage to defendant if the injunction issues; Section 8 requires proof that all efforts at negotiation have been exhausted. Not only was there no hearing at which any of these things were proven, but they were not even alleged. These provisions are clearly applicable to this situation, and until at least they are complied with the Norris-LaGuardia Act prohibits an injunction.

The necessity of literal application of the Norris-LaGuardia Act and the danger of grafting implied exceptions or implied *pro tanto* repeals are emphasized by the archaic atmosphere in which this case and an allied case have moved in the District Court. The very existence of these controversies in the courts and of preliminary injunctions that have been issued highlight as do few other situations one of the purposes of the Norris-LaGuardia Act to prevent the courts from interfering in and settling labor disputes by injunction.

The first step is seen in this case, where the District Court ordered an injunction against the carrying out of long-established contracts governing terms and conditions of employment. Then in *Palmer et al.* v. *Brotherhood et al.*, D.C., D.C., No. 662-48, the Brotherhood had served proposals on the railroads to eliminate all distinctions between promotable and non-promotable firemen, to abolish the latter category, and to make all firemen promotable. But promotability entails some risks; in the event of failure of promotion examinations three times the employee loses his fireman seniority or is dismissed from the service. An injunction was sought to prevent negotiations pursuant to such notice, and the District Court enjoined the consu amation of any contract embodying such proposal or other terms having a similar effect.[2] Thus under the theory, first an-

[2] A special appeal was allowed to the Court of Appeals, and that case is now pending in that Court, No. 9863.

nounced in this case, that the collective bargaining agent is a fiduciary of each person he represents and may not do anything that may harm any member of the craft (R. 63), we have the intrusion of the courts carried to running the day-to-day process of collective bargaining. Before negotiations were well under way, before we could learn what kind of an agreement negotiations might produce, the Court has instructed us on what agreement we may or may not make.

It is an ironic commentary that as a consequence of the courts not having been granted jurisdiction to regulate labor relations, the United States District Court for the District of Columbia is now regulating them in the railroad industry with far closer scrutiny, far greater paternalism, and more intimate detail than it would if such jurisdiction had been expressly conferred. It finds its basis in a theory that the Brotherhood is in a fiduciary relationship with every member of the class it represents. Any member of the class who feels aggrieved by any conduct or proposed conduct may come into Court and have the representative enjoined to adhere to the Court's view of strict fiduciary conduct. Since it is the fiduciary of each member of the class, it cannot properly do anything that might hurt any member. That is the view of the District Court. Had the Railway Labor Act expressly provided for judicial review of railway labor contracts, we may presume that the scope of review would have been the ordinary standard of whether there was a reasonable basis to sustain the contract. But the Railway Labor Act withholds judicial review. In its place we are now having imposed upon us by the District Court review of contracts and proposals for negotiating contracts predicated upon a fiduciary relationship for each member of the class represented. Under the standard for fiduciaries, the contract or proposal is nullified if there is any argument against it,—or the opposite extreme from what the standard would be if judicial review were expressly conferred instead of expressly denied. And the remedy

is by injunction. All this in the face of the Railway Labor Act, which denies judicial review of action thereunder, and in the face of the Norris-LaGuardia Act, which, it was believed, deprived the federal courts of jurisdiction to issue injunctions in labor disputes. This is the virtually inevitable consequence of implying exceptions or repeals to meet supposed factual situations that a particular tribunal may consider objectionable. The only safeguard against obliterating the gains of the Norris-LaGuardia Act, obtained after years of struggle and suffering and a belated recognition that only its categorical terms would be adequate, is to abide by the first rule of statutory construction, that when Congress used unequivocal language it meant what it said and that possible disagreement with the principle of the result is not a judicial function.

II. Respondent May Not be Sued in the District of Columbia in this Action, for it is Not an Inhabitant Thereof.

The federal venue statute prohibits suit in the district courts against a defendant not an inhabitant of the district. 28 U.S.C., Sec. 112 (now 28 U.S.C., Sec. 1391(b)). A supposed local venue statute of the District of Columbia prohibits suit against a defendant not resident or found in the District of Columbia. D.C. Code (1940 ed.), Sec. 11-308. In most cases, of course, the federal venue statute is more restrictive.

The petitioners argue that since this case might be brought either in the federal courts or in state courts (a point that has been assumed but never decided), the District Court for the District of Columbia may sit in this case exclusively as a local court and apply only the supposed local venue statute in determining whether this suit is prohibited in that Court. The question of the applicability of the local venue statute to this proceeding is obviously a legal question local to the District of Columbia; it is a purely local question under a local statute. This Court has repeatedly stated that on such a question the decision

of the Court of Appeals will ordinarily be accepted as final. *Fisher* v. *United States*, 328 U.S. 463; *Busby* v. *Electric Utilities Employees Union*, 323 U.S. 72; *District of Columbia* v. *Pace*, 320 U.S. 698, 702; see *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285; cf. *United Surety Co.* v. *American Fruit Products Co.*, 238 U.S. 140, 59 L. Ed. 1238; *American Security & Trust Co.* v. *District of Columbia*, 224 U.S. 491, 56 L. Ed. 856.

But in any event, the decision below was correct in holding the local venue statute inapplicable to this proceeding. With nothing to prevent the application of the prohibition in the federal venue statute, venue was mischosen in this case.

A. Under the federal venue statute, venue was improperly laid in the District of Columbia.

The jurisdictional allegations of the complaint invoked the jurisdiction of the District Court on the ground that the action arises under the Constitution and laws of the United States. R. 1, 14.

The respondent is an unincorporated association which has its headquarters and principal place of business in Cleveland, Ohio. The only office maintained in the District of Columbia is that of its national legislative representative (who is also one of its vice-presidents). The only other person in that office is an employee who is clerk-stenographer to the national legislative representative. The Brotherhood otherwise comes to the District only sporadically, to appear before Governmental bodies. R. 40-3.

In an action not based on diversity, and with other exceptions not relevant to this case, a defendant may be sued in a district court only in the district in which it is an inhabitant. 28 U.S.C., Sec. 1391(b) (formerly 28 U.S.C., Sec. 112); *Blank* v. *Bitker*, 135 F. (2d) 962, 965 (C.A. 7, 1943); *Sperry Products, Inc.* v. *Association of American Railroads*, 132 F. (2d) 408 (C.A. 2, 1942).

In the *Sperry Products* case the Court of Appeals for the Second Circuit considered in some detail the proper venue

for a civil suit against an unincorporated association in its common name. The Association of American Railroads is an unincorporated association of many railroads engaged in activities for the common benefit of its members. The evidence showed that its principal office was in Washington, but that it maintained offices and engaged in extensive activities in New York also. Suit was attempted to be brought against it in New York. The court found that the association's activities in New York were such that it could be said to be "found" there, and that it maintained in that district a "regular and established place of business". But it held that to be an "inhabitant" of a federal judicial district within the meaning of the federal venue statute requires something more than "a regular and established place of business", that it is akin to domicile. It concluded that an unincorporated association is an "inhabitant" for federal venue purposes only of the district in which is located its principal place of business. 132 F. (2d) 408, 411. The petitioners cite nothing to the contrary; they apparently concede that if the federal venue statute is applicable this case must be dismissed or transferred.

B. Venue may not be laid in the District of Columbia under the so-called local venue statute.

The petitioners contend that in a proceeding in the United States District Court for the District of Columbia which might have been brought either in the federal courts or in the state courts, venue is properly laid in the District of Columbia although the case is prohibited either by the federal venue statute or by an alleged local District of Columbia venue statute, so long as it is not prohibited by both.[3] Under the supposed local statute, the suit is not

[3] Of course, literally there is nothing to prevent both venue statutes from applying, so that if a particular proceeding is prohibited by either venue statute it may not be maintained. But respondent need not go so far in this case; here we urge only that if the suit is cognizable by the District Court as an Article III court, only the federal venue statute applies, and if it is not so cognizable, then the local venue statute would apply.

prohibited and the District Court could entertain jurisdiction if the respondent is "found" in the District, and it is found in the District if it is doing business in the District. The local venue statute cannot be applied, for three reasons.

1. We show below that there is no local venue statute applicable to the District Court, for what was formerly such a statute has been repealed. But even if we regard the local venue statute as still subsisting, it does not permit suit against the respondent in this cause, for respondent is not engaged in business in the District of Columbia but comes here only sporadically. The two local lodges of the Brotherhood are engaged in activities in the District,[4] but it is plain that they are unincorporated associations separate and distinct from the national organization, and the activities of the local lodges cannot be attributed to the national organization. R. 43.

The Court of Appeals found it unnecessary to consider this point, because it found the federal venue statute to govern. R. 76. The petitioners say that it cannot seriously be challenged that respondent is doing business in the District of Columbia. However, the District Court was personally of the opinion that the respondent is not doing business in the District of Columbia, but held otherwise out of deference to its erroneous interpretation of the holding in *Tunstall* v. *Brotherhood*, 148 F. (2d) 403. R. 50-1. It is plain that the *Tunstall* case did not hold that respondent was doing business in the district there involved. That case had nothing whatever to do with venue. Moreover, insofar as that case sustained service of process it did so expressly as a class suit and recognized that it was highly questionable that the service could be sustained for a suit

[4] In their petition for a writ of certiorari the petitioners urged that because of this respondent was subject to suit under the Labor Management Relations Act, 1947. In our brief in opposition we pointed out that railway labor organizations are specifically excepted from the terms of the Act. The petitioners do not mention the point in their brief, and we assume it is abandoned.

against the national organization as a suable entity. 148 F. (2d) 403, 405.

2. But there is a more basic error in the view that the District Court could entertain jurisdiction under the local venue statute because it has both federal and local jurisdiction.[5]

The petitioners argue vigorously that the District Court for the District of Columbia has both federal jurisdiction as a federal court, and local jurisdiction as a local court. They infer that in any case that could be brought in either the federal courts or in state courts, the District Court can act as a federal court, at which time the federal venue statute would be applicable, or it can act as a local court, at which time the supposed local venue statute would be applicable.

Of course, no one today disputes that the United States District Court for the District of Columbia exercises both federal jurisdiction under Article III of the Constitution and jurisdiction as a local court under Article I, but it cannot exercise both simultaneously in the same cause nor select the capacity in which it chooses to act. As the Court below pointed out, venue would not lie in a federal district court when the federal venue statute prohibited the suit but under a state venue statute a non-inhabitant defendant could be sued in the state courts. R. 73; *Doyle* v. *Loring*, 107 F. (2d) 337, 340 (C.A. 6, 1939).

Illustrative of the proposition that the District Court may not act both as an Article III court and an Article I court simultaneously in the same cause of action is *King* v. *Wall and Beaver St. Corp.*, 79 App. D.C. 234, 145 F. (2d) 377 (C.A. D.C., 1944). That case was a stockholder's suit against King, to which the corporation was an indispensable

[5] The petitioners' confusion probably arises from their confusing jurisdiction and venue. Thus they criticize the Court below for discussing the applicability only of Section 11-308 of the D. C. Code (1940 ed.) and ignoring Section 11-306 in this connection. But the Court below was correct in discussing Section 11-308 as the section pertinent to this question. Section 11-306 is the jurisdictional section conferring general jurisdiction in the District Court; Section 11-308 is the venue provision prohibiting suit in certain cases even though there be jurisdiction.

party. King was an "inhabitant" of Connecticut but was temporarily in the District of Columbia and "found" there, while the corporation was a Maryland corporation neither resident nor found in the District. A special federal venue provision provides that in such a proceeding a defendant may be sued by the stockholder wherever the corporation could have sued him (28 U.S.C., Sec. 1401) and it is provided that process may be served upon the corporation wherever it could be found (28 U.S.C., Section. 1695). King was served in the District of Columbia and the corporation was served in Maryland. The Court of Appeals held that the motions to dismiss should have been granted. King could be sued in the District if only the local and not the federal venue statute applied, for he was found but was not an inhabitant of the District, while the corporation could be made a party only if the special federal and not the local venue statute applied, for it was amenable to such suit only under the special federal provision and was neither resident nor found in the District. In substance, the Court held that the District Court in a particular cause must be acting either as a federal court or as a local court, and could not act as both simultaneously. If acting as a federal court and the federal venue statute applied, the suit was prohibited against King in the District; and if sitting as a local court and the local statute applied, the corporation could not be made a party. See particularly 79 App. D. C. at pp. 236-7.

O'Donoghue v. *United States*, 289 U.S. 516, shows that the United States District Court for the District of Columbia may not select the capacity in which it chooses to act if its jurisdiction is invoked under powers it possesses that might have been conferred either under Article III or under Article I. In that case this Court held that in such cases the United States District Court for the District of Columbia exercises Article III judicial power, and that the exercise of such power cannot be affected by local legislation. See particularly p. 546. Of course, the local venue statute, even if still in effect, would be local legislation. It is clear that Article III judicial power extends to this controversy, and

therefore we may not look to local legislation to see whether venue lies in the District of Columbia in this action. Especially must this be so where jurisdiction is expressly predicated upon the action arising under the Constitution and laws of the United States. Since the federal venue statute prohibits this type of suit in a Federal District Court in a district in which the defendant is not an inhabitant, to hold that a non-inhabitant of the District of Columbia may be sued in the United States District Court for the District of Columbia under the local venue statute in a suit cognizable in Article III courts would hold in substance, under the *O'Donoghue* case, that that District Court is not an Article III court.

The *O'Donoghue* case involved the question whether the District Court for the District of Columbia was a court established under Article III, so that the limitations of that article with respect to the tenure and compensation of judges were applicable. The majority held that it was established both under Article III and under Article I. The dissenting opinion urged that it was exclusively an Article I court, established pursuant to the power of Congress to provide for the government of the District of Columbia. In denial of that Court exercising Article III power the dissenting Justices showed that every power vested in the Court could be vested in it as an Article I court, that in everything it did it could be acting as an Article I court, and therefore there was no need to look to Article III. It was apparently in an effort to overcome the force of that argument that the majority stated that when the District Court is exercising judicial power in a case cognizable under Article III it is exercising judicial power conferred under that Article, and such exercise is not affected by legislation pertaining to the court as a local court. In the words of this Court (at p. 546):

> "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the states, whether it has done so in any particular

instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere."

The question then becomes, is this cause cognizable in a court established under Article III? If so, the entertaining of this case is unaffected by local legislation. Clearly this cause is cognizable in the federal courts established under Article III, indeed, the jurisdiction of the District Court was expressly invoked on the basis of the action arising under the Constitution and laws of the United States, and just as clearly Section 11-308 of the D.C. Code (if it is law), upon which petitioners rely, is local legislation. Accordingly, we may not look to that section to determine whether venue lies in the District of Columbia, but may properly look only to the federal venue statute. Otherwise, the purely local venue statute would be permitted to override the specific prohibition in the federal venue statute against suing a non-inhabitant of the District in a federal district court.

The petitioners are concerned that the holding below will result in plaintiffs in the District of Columbia being able to sue under only one venue statute in certain causes of action, while plaintiffs elsewhere may have a choice of two venue statutes in cases that may be brought either in the federal courts or in state courts. We fail to perceive the relevance of this, so long as an adequate forum is presented and the venue statute is reasonable. And incidentally, not one of the twenty-one petitioners, plaintiffs below, who are so concerned with the rights of residents of the District of Columbia, is a resident of the District of Columbia.[4]

[4] Seven are residents of Florida, six of North Carolina, four of Virginia, two of Georgia, and one each of South Carolina and Mississippi. R. 9-13.

3. What is sometimes believed to be a local venue statute, applicable in the District of Columbia, is not law, for it was repealed by Act of Congress. The provision appears as Sec. 11-308, D.C. Code (1940 ed.). That Code is an unofficial compilation of laws of a general and permanent nature in force in or pertaining to the District of Columbia other than laws applicable in the District of Columbia by reason of being general laws of the United States. The contents of the Code are not legislation; they are simply compilations prepared under the supervision of a Congressional Committee. Act of May 29, 1928, ch. 910, 45 Stat. 1007. But an analysis of the history of Sec. 11-308 shows that it was repealed by an Act of Congress, and is included in the 1940 Code through error.

What now appears as Sec. 11-308 of the D.C. Code, 1940 ed., existed for many years as a statute governing the venue of actions in the District of Columbia. It was last enacted in 1874 as part of the Revised Statutes of the United States Relating to the District of Columbia. 18 Stat., Pt. 2, pp. 1, 91. That Act repealed all prior statutes pertaining to the District of Columbia and any part of which was included in the revision. Sec. 1296; 18 Stat., Pt. 2, p. 149. The last time a District of Columbia code or compilation of statutes was enacted by Congress was in 1901 when there was enacted The District of Columbia Code. In enacting that Code Congress was consciously making many substantive changes in the pre-existing law, but unfortunately the records do not specify what the changes were. H. Rpt. 1017, 56th Cong., 1st Sess. The 1901 Code did not contain the local venue statute nor any substitute venue statute, and Section 1636 of that Code repealed all other acts and parts of acts in force solely in the District of Columbia with exceptions having no relevance here. Under the 1901 Code, the last legislation on the subject, there is no local venue statute applicable to the District Court for the District of Columbia, and there is nothing to prevent the application of the general federal venue statute under which this suit may not

be maintained in the District of Columbia. The 1929 and 1940 Codes[7] mistakenly include the old local venue statute as a law having effect in the District of Columbia, but those Codes are simply unofficial compilation of laws believed by the compiler to be in effect. Although they may be prima facie evidence of the law, the foregoing demonstration of the mistaken inclusion of the local venue statute overcomes the force of any such presumption.

Since, then, there is no local venue statute in effect governing the United States District Court for the District of Columbia, the only venue statute governing that Court is the federal venue statute; and it is abundantly clear that under the federal venue statute venue was mistakenly chosen in the District of Columbia.

C. This case may not be maintained as a class suit.

The petitioners seek to sustain venue in the District of Columbia also on the ground that the proceeding was a class suit against the members of the Brotherhood in addition to being a suit against the Brotherhood as a suable entity, and that since the named members of the alleged class are inhabitants of the District of Columbia venue properly lies in the District of Columbia. They assert that the decision of the Court below in this case conflicts with the decision of the Fourth Circuit in *Tunstall* v. *Brotherhood*, 148 F. (2d) 403. There are three basic errors in any such contention.

1. The *Tunstall* case in the Fourth Circuit had nothing whatever to do with venue. The only discussion in that case concerning a class suit pertained to the question of whether there had been proper service of process for such a suit.

2. The Court below held that a class suit was not properly brought because the individuals named as representa-

[7] In *King* v. *Wall and Beaver St. Corp.*, 79 App. D. C. 234, 145 F. (2d) 377, it was apparently assumed that the local venue statute is still in effect. The issue was not raised or discussed.

tives of the class were not in fact representative of the class for the purposes of this litigation. The District Court made no finding that the named members of the class were properly representative, and the Court of Appeals held that such a finding could not be made because the named members were not representative for the purposes of this litigation. In the *Tunstall* case, to be sure, service of process was sustained by treating the case as a class action,[8] but in that case the local members named as representatives of the class were governed by the collective bargaining agreement under attack, were the very persons who would receive the job assignments to which the members of the plaintiff class claimed they were entitled, and were accordingly specifically found to be representative to determine the issue of the validity of that collective bargaining agreement. Here we have no such situation, and on the basis of these different facts the Court below distinguished the *Tunstall* case. It is not alleged that any of the members of the local lodges named in this case are employed on any of the railroads named as defendants in the proceeding brought in the District Court in this case, and in fact none of the employees of any of those railroads is a member of or is eligible for membership in these local lodges. R. 52. Thus the local defendants are not governed by and have no interest in the contracts under attack, and therefore are not in a position to defend the interest of those who do have an interest in those contracts.[9]

But, say the petitioners, the question whether the named members of the class sued will fairly represent the interest of the absent members does not turn on whether those named have participated as fully as the others in the acts complained of, and that the question whether the named

[8] To the extent that this was done the *Tunstall* case is in conflict with *Sperry Products, Inc.* v. *Association of American Railroads*, 132 F. (2d) 408 (C.A. 2, 1942). By no interpretation can the decision in the *Tunstall* case on this point be considered in conflict with the decision below.

[9] Moore's Federal Practice (2nd Ed., 1948) gives as one of the tests of adequate representation in a class suit "the ability of the named party to speak for the rest of the class." P. 3425.

defendants are truly representative is not determined by technical niceties. In general, we would have no quarrel with such a proposition. But the difficulty here is that the named defendants did not participate at all and have no interest in the acts complained of, and are unfamiliar with the allegedly wrongful contracts and the situation that gave rise to them.[10] To ask them to defend conduct with which they are totally unfamiliar and in which they have no interest would be the clearest abuse of the class-action procedure.

3. In this case, the respondent was sued as a suable entity and its members were sued as a class. But a class suit is improper where an unincorporated association is sued in its common name. *Sperry Products, Inc.* v. *Association of American Railroads*, 132 F. (2d) 408, 412 (C.A. 2, 1942). This is obviously sound. The reason for this is apparent when we recollect why class suits are permitted at all. Class suits are permitted when the parties are so numerous that it is impractical to bring them all into court. Indeed, the Federal Rules limit the use of class actions to cases in which such a situation in fact exists. F.R.C.P., 23(a). In such a situation a few members fairly representative of the class are selected to represent the class. But when the members of the class are an association and are made suable as such, the necessity of permitting a class suit in such situation disappears.[11] Thus the *Sperry* case properly held that when an unincorporated association is suable in its common name its members cannot be sued in a class

[10] "In an action against a defendant class the court should be particularly careful to ascertain that the defendants named by the plaintiff have 'the necessary interest or inclination to make a vigorous defense of the suit.'" Moore's Federal Practice (2nd ed.), p. 3432.

[11] "The class action was a procedural invention of equity mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals * * * from enforcing their equitable rights nor grant them immunity from their equitable wrongs." *Montgomery Ward* v. *Langer*, 168 F. (2d) 182, 197 (C. A. 8, 1948). In that case a class action procedure was sustained but the court specifically pointed out that the union was not suable in its common name in that jurisdiction. P. 186.

suit. In the instant proceeding not only is the unincorporated association suable in its common name but it was in fact sued in its common name. In such a situation, to permit a class action also against the members of the association in the very same proceeding carries the use of the class action procedure beyond its legitimate purpose and utilizes it simply as an evasion of the federal venue statute's prohibition against suing the non-inhabitant association in this district.

D. Whether this case should be dismissed or transferred to the Northern District of Ohio.

Finally, the petitioners are critical of the action of the Court of Appeals in directing a transfer of the case to the Northern District of Ohio pursuant to 28 U.S.C., Sec. 1406 (a). As that section read at the time of the decision in this case by the Court of Appeals, a district court in which a case was filed laying venue in the wrong district was directed to transfer the case to a district in which it could properly have been brought. Since the decision in this case by the Court of Appeals, that section has been amended to provide that such a case should be dismissed or, if it be in the interest of justice, should be transferred to a district in which it could have been brought. Pub. L. 72, 81st Cong., 1st Sess., Appd. May 24, 1949, Sec. 81; S. Rpt. 303, 81st Cong., 1st Sess., H. Rpt. 352, 81st Cong., 1st Sess.

Apparently at the time the Court below decided this case no practice had yet developed in the Courts of Appeals as to whether in cases where those Courts found venue mischosen they would direct a transfer or would remand to the district court for a determination of the proper district, if any, to which transfer should be made; nor has a corresponding practice yet developed under the section as amended. It is clear, however, that the action of the Court below in directing the transfer can in no way prejudice the petitioners even if there be a better practice. It is clear from the record that the Northern District of Ohio is the

proper venue for a suit in the Federal courts against the Brotherhood. There is no other district to which this case could properly be transferred. If the petitioners are correct in their apprehension that jurisdiction of the railroad defendants would not be obtained in that district, then the only alternative for the Courts of the District of Columbia would be to dismiss the action. A direction to transfer when a dismissal would have been in order cannot possibly prejudice the petitioners. Upon the transfer, opportunity will necessarily be afforded for a determination whether the railroad defendants are suable in the Northern District of Ohio, and if not whether they are indispensable parties. Neither of these issues was raised or determined in this proceeding. No possible contention of petitioners is foreclosed.

Of course, it is immaterial to respondent whether this case is dismissed or transferred to the Northern District of Ohio. We point out the above considerations for the convenience of the Court and do not take any position on whether the Court below should have ordered the case dismissed or directed the transfer.

III. Respondent has not been Served with Process in this Action.

Rule 4 (d)(3) of the Federal Rules of Civil Procedure provides that service of process upon an unincorporated association shall be made by delivering a copy to an officer, a managing or general agent, or other agent authorized to receive such process. In this action, process has not been served upon any such officer or agent of the Brotherhood. The respondent did have a vice-president, its national legislative representative, who did have an office in the District of Columbia, but no service was had upon him; he had been absent from the District for several months due to illness. The only purported service upon the Brotherhood was made by serving that officer's clerk-stenographer, who

had no authority to accept such service and who did not purport to accept such service.[12] R. 40.

The only other persons served are officers of the two local lodges in the District of Columbia. But these local lodges are separate unincorporated associations, and the local officers hold no office of any kind in the Brotherhood. R. 43; see *United Mine Workers* v. *Coronado Co.*, 259 U.S. 344, 385-9, 66 L. Ed. 975; *Dean* v. *International Longshoremen's Association*, 17 F. Supp. 748. It is specifically provided in the constitution of the Brotherhood that officers of local lodges are not agents of the Brotherhood. And it has repeatedly been held that service upon a national or international labor organization has not been effectuated in accordance with Rule 4(d)(3) when the service was made upon an officers of a local lodge. *Singleton* v. *Order of Railway Conductors*, 9 F. Supp. 417 (D.C., S.D. Ill., 1935); *Dean* v. *International Longshoremen's Assn.*, 17 F. Supp. 748 (D.C. La., 1937). And this result was specifically intended when the Rule was drafted.[13]

The District Court, however, held that service had been effectuated. R. 59. This ruling was predicated upon misconception of two cases by Courts of Appeals.

The first case relied upon was the *Tunstall* case in 148 F. (2d) 403. The District Court understood that case to hold that the local lodges of the Brotherhood "are to be deemed

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[12] The petitioners hint that this may have been enough, with the gratuitous statement that he was temporarily in charge of the Washington office. The record shows that Russell was simply clerk-stenographer to a vice-president; there is nothing whatever in the record to justify even speculation that he could have been an officer or agent of the character specified in Rule 4(d)(3). R. 40.

[13] This is shown in the hearings before the House Judiciary Committee on March 2, 1938. It was suggested by a labor attorney that Rule 4 (d)(3) should provide that unincorporated associations could not be served by serving an officer or agent of a local lodge. P. 56. In response to that suggestion a member of the Advisory Committee stated to the Judiciary Committee: "The Rule does not permit service upon officers or agents of subsidiary organizations, in cases where the named defendant is a parent or controlling organization, unless the person served is also one of the authorized officers or agents of the parent organization. I do not think that the Rule will be at all embarrassing to labor organizations. In fact, it seems to me that it affords them even more protection than does the existing practice in many states and in the federal courts." P. 85.

as agents of the Brotherhood for the purpose of service of process." R. 60. Any such view of the *Tunstall* case was not only not intended by the Court of Appeals for the Fourth Circuit but that Court had strong doubts (without ruling on the point) that the service upon the local officers would have been proper for a suit against the Brotherhood as a suable entity. As that Court said (at p. 405):

> "If this were not a class suit, but merely a suit against the unincorporated association in its common name, there would be much force to the position that the entity was not properly served."

Moreover, the facts in this case are different. In the *Tunstall* case the Court found as a fact that the local officers were representative of the class sued. In this case, not only did the District Court make no such finding, but the Court of Appeals found that no such finding could be made here. R. 78. Furthermore, as we have seen above (point II, C), a class suit cannot be permitted where, as here, the class is a suable entity. *Sperry Products, Inc.* v. *Association of American Railroads, supra.*

The other case relied upon by the District Court was the decision of the Court of Appeals for the District of Columbia in *Operative Plasterers* v. *Case*, 68 App. D. C. 43, 93 F. (2d) 56 (1937). That case involved the question of the validity of a judgment entered by a North Carolina state court. It was contended in the District of Columbia action that the North Carolina judgment was not entitled to full faith and credit in the District because there had not been proper service in the North Carolina action. In the North Carolina action service had been contested, and it had been held by the court that service had been properly made under the law of that State. The only question before the Court of Appeals for the District of Columbia was whether the method of service authorized by North Carolina law and carried out in accordance with North Carolina law complied with the requirements of due process. If it complied with the requirements of due process, then the North

Carolina state-court judgment was entitled to full faith and credit in the District of Columbia; if it did not comply with such requirements then it was not binding in the District of Columbia.

In determining that question the Court of Appeals for the District of Columbia of course applied the test of whether the North Carolina method of service was reasonably calculated to give the defendant notice of the pendency of the action. The Court of Appeals concluded that under the facts shown service on the officers of local lodges of the organization involved in that case, as authorized by North Carolina law, was reasonably calculated to give such notice, that it therefore complied with the constitutional requirements of due process, and that the judgment therefore was entitled to full faith and credit in the District of Columbia. But the Court of Appeals in the *Operative Plasterers* case did not and could not make any holding on what is sufficient process in the District of Columbia, for that question was not even remotely relevant to the issue.

The District Court in this case misconstrued the holding in the *Operative Plasterers* case, and considered it to hold that since service on the local officer would probably result in notice to the national organization, such local officer was an agent of the national organization for purposes of service of process. R. 60. This, as we have seen, was fallacious. That case has no relevance to what constitutes compliance with Rule 4(d)(3), F.R.C.P. It could have no such relevance for it involved no question of service in the District of Columbia, and of course the North Carolina state courts are not bound by Rule 4(d)(3). Indeed, the Court of Appeals has stated, more recently than its decision in the *Operative Plasterers* case, that when an unincorporated association is sued in the District of Columbia service is to be made in accordance with Rule 4(d)(3). *Busby* v. *Electric Utilities Employees Union*, 79 App. D.C. 336, 147 F. (2d) 865 (1945).

Rule 4(d)(3) requires that service of process upon an unincorporated association shall be effectuated by serving

one of several specified officers "or any other agent authorized by appointment or by law to receive service of process." It cannot be disputed that none of the specified officers was served. The petitioners' argument amounts simply to an assertion that "other agent authorized * * * by law to receive service of process" means any individual who if served would be likely to give the defendant notice of the action. No authority is cited for such a startling proposition other than the *Operative Plasterers* case, and as we have seen, that case cannot by any stretch of the imagination be considered so to hold.

Since the respondent was not served with process, the District Court was without jurisdiction and should have dismissed the action. The reversal by the Court of Appeals was proper for this independent reason also, but the Court found it unnecessary to consider this ground of reversal since it reversed on other adequate grounds.

IV. The Preliminary Injunction should not have been Granted Because it Would Alter the Status Quo.

The temporary injunction granted by the District Court, and stayed by the Court of Appeals before it became effective, would give the petitioners most of the final relief requested. It would require a radical change in long-established practices and give petitioners a different status as employees than they have had heretofore.

It is well settled that the function of a preliminary injunction is to preserve during the pendency of the litigation the situation that existed when the proceeding commenced, and that it is improper to employ it to grant any of the relief by way of change in the pre-existing situation which it is the object of the lawsuit to obtain. *United States* v. *Adler*, 107 F. (2d) 987 (C.A. 2, 1939); *Warner Bros. Pictures* v. *Gittone*, 110 F. (2d) 292 (C.A. 3, 1940).

United States v. *Adler*, *supra*, was a proceeding to compel compliance with the milk-marketing program of the Government. Apparently it was agreed for the purposes

of deciding the question on appeal that the Government was certain to prevail, and it was vigorously urged that it was essential to the effectiveness of the regulation that not only should there be compliance but that the compliance be prompt. Nevertheless, the Court held a preliminary injunction improper, and stated:

> "The purpose of an injunction *pendente lite* is to guard against a change in conditions which will hamper or prevent the granting of such relief as may be found proper after the trial of the issues. Its ordinary function is to preserve the *status quo*." (at p. 990.)

Similarly, in *Warner Bros. Pictures* v. *Gittone*, *supra*, where there was also little doubt of the final outcome of the case, the Court of Appeals reversed an order granting a preliminary injunction because "the effect of the preliminary injunction which the court granted was not to preserve the status quo but rather to alter the prior status fundamentally. Such an alteration may be directed only after final hearing."

The petitioners urge that unless the preliminary injunction is made effective they will suffer irreparable injury during the pendency of the action. It is sufficient to point out that if the preliminary injunction should go into effect the promotable firemen will suffer irreparable injury during the pendency of the action if they finally prevail. It is the petitioners who are asking the change; and unless and until it is decided that they are entitled to the change it is highly improper to grant it to them. As the Court stated in the *Warner Bros.* case:

> "Irreparable loss resulting from refusal to accord the plaintiff a new status, as distinguished from interference with rights previously enjoyed by him does not furnish the basis for interlocutory relief."

The Court below found it unnecessary to consider this point, for it reversed the order granting the preliminary injunction on other grounds. R. 74. The District Court

recognized that a preliminary injunction would alter the pre-existing relationships and rights of the parties and that such was not the usual function of a preliminary injunction. But it thought that exceptions could be made, and that this case was exceptional in that no doubtful question of law was involved in view of the decisions of this Court in *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, and of the Fourth Circuit in *Brotherhood* v. *Tunstall*, 163 F. (2) 289. R. 65. It may be observed that in *United States* v. *Adler*, *supra*, and in *Warner Bros. Pictures* v. *Gittone*, *supra*, it was assumed that the final outcome was certain to be in favor of the complainants, and yet it was held to be improper to give relief to change the *status quo* as interlocutory relief. But an analysis of the *Steele* and *Tunstall* cases shows the District Court to have been wrong in assuming that they removed any doubt from the law applicable to this case, even if we take all the allegations in this case as proven to avoid the question of how one can know what law [14] is applicable until one knows the facts.

The *Steele* case came up on a demurrer to the broad allegations of the complaint, broader than the allegations in this case. It determined nothing on the merits. It holds only that those sweeping allegations, uncontradicted and unexplained, stated a cause of action. The state courts had held that the Railway Labor Act imposed no duty on a bargaining representative not to treat any group with deliberate unfairness, no matter how gross the unfairness. This court held that to be error. The *Tunstall* case decided in the Fourth Circuit involved not only a different railroad but a quite different factual situation in that a different contract was in effect—a contract so discriminatory that some portions of it were admitted to be illegal.

The situation here is quite different. Here none of the facts have been established and the defendants have not

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[14] The petitioners assert that the *Tunstall* case declared the Southeastern Carriers Conference Agreement invalid. P. 34. That case did not even involve that agreement but involved one quite different. See *Brotherhood* v. *Tunstall*, 163 F. (2d) 289, 292. Also, the instant case involves many agreements in addition to the Southeastern Carriers Conference Agreement.

demurred to the complaint; there have been no general admissions and no hearing whatever on any of the merits of the case. We have now filed our answer in which not only do we deny many of the allegations of the complaint but allege, and expect to prove at the final hearing if the District Court may entertain this case, additional facts which throw an entirely different light on the admitted actions of the Brotherhood.

Petitioners misconceive our argument on this point. They argue that respondent must show an abuse of discretion in granting the injunction to have it set aside. We do not dispute that in circumstances where an injunction may issue we would have such burden. But we rely on an entirely different principle of law, that a preliminary injunction may not issue to change the *status quo* whatever the circumstances. The cases cited above illustrate that principle. The petitioners cite nothing to the contrary.

A further examination of the *Warner Bros.* case shows how closely analogous was the situation there involved to the alleged situation of the petitioners here. The petitioners here contend that they do not ask for restoration by preliminary injunction of what they suffered from past discrimination, but seek only to enjoin alleged future discriminations. The appellees in the *Warner Bros.* case sought to enjoin discrimination against them in the furnishing of moving pictures and urged, as do the petitioners here, that in view of certain decisions of this Court there was no doubt of the ultimate outcome of the case. It was apparently assumed in that case that there was no doubt the appellees would ultimately prevail. They too were not seeking a preliminary injunction to undo past wrongs but only to obtain in the future the treatment they alleged they were entitled to by law. But it was held that a preliminary injunction was not a matter of discretion where the complainants were seeking it to obtain a status not then being enjoyed, as distinguished from retaining a privilege. That is exactly the situation of petitioners here. They are seeking rights they

are not now enjoying under existing operating practices, and such rights may not properly be awarded as interlocutory relief.

V. Petitioners' Request for Interlocutory Relief in this Court.

Petitioners request this Court, in the event it finds the venue basis of the decision below to be erroneous and does not consider the other three grounds for affirmance but remands to the Court below to consider those other grounds, to remand with instructions to vacate the stay of the preliminary injunction pending the appeal.

This request is predicated primarily upon the assertion that Negro firemen are continually losing their employment because of allegedly discriminatory and illegal agreements. They state that "the Brotherhood will not be able to deny that additional colored firement have lost their hard-earned positions throughout 1948 and 1949 and even since this Court granted certiorari in this very case. The question presented here is whether this discrimination should be allowed to continue while the matter is pending further before the court below." P. 39.

The Brotherhood does deny the assertion of petitioners, categorically asserts that the petitioners' statement is untrue in each of its segments, and states that no Negro fireman has become unemployed during the periods stated by reason of any agreement which in this case or elsewhere has been alleged to be discriminatory.

The Government in its brief *amicus curiae* states that this Court has held unlawful the very agreement under attack in this case (pp. 2, 7) and that this Court should stop the "continued discriminatory firing of colored employees". P. 6. The agreements involved in this case are not the same as the agreement involved in the *Tunstall* cases; this is apparent from a comparison of the agreement attached to the complaint (R. 17) and the agreement involved in the *Tunstall* cases which is summarized in 163 F. (2d) 289.

And as we have stated above, there is no basis for the allegations by the Government and petitioners of "continued discriminatory firing of colored employees".[15]

The principal basis upon which the request for interlocutory relief in this Court is made, therefore, does not exist. Nor is there any merit to the other arguments advanced for this Court taking such action.

These other arguments are in substance the same as the arguments advanced in the District Court. The Brotherhood opposed the action requested in the District Court on the grounds, among others, that the federal courts are without jurisdiction to grant such relief, that the Brotherhood has not been served with process and brought into court, and that the granting of such relief to change the *status quo* is not authorized by law. It should be remembered that the request of petitioners for interlocutory relief by this Court is conditioned upon this Court not passing upon such questions but remanding them to the Court of Appeals for initial consideration by that Court. It is submitted that in the absence of a decision by this Court that the federal courts have jurisdiction to grant injunctive relief in this case and a decision that the Brotherhood has been brought into court so that it would be subject to the order requested, such an order should not be directed.

CONCLUSION.

A. We have shown that the plain words of the Norris-LaGuardia Act deprived the District Court of jurisdiction to issue the preliminary injunction. There can be no question that the controversy which is the subject of this pro-

[15] The Government also suggests (footnote, p. 8) that even if this Court finds that venue did not lie in the United States District Court for the District of Columbia it should nevertheless order that the injunction issued by that Court should be reinstated pending submission of the case to the United States District Court for the Northern District of Ohio. This amounts to a suggestion that if this Court affirms the decision below because it finds that the suit was prohibited in the District Court for the District of Columbia, it should reverse the order of the Court below and reinstate the action of the District Court taken in violation of federal statute. Merely to state the proposition is to reveal its absurdity.

ceeding literally falls within the definitions in the Act of a controversy involving or growing out of a labor dispute, in which the federal courts are deprived of jurisdiction to issue injunctions except under conditions not even purportedly met in this case. No other exceptions are contained in the Act itself. But petitioners urge that there is an implied exception of a controversy involving a violation of another later federal statute, in this case an implied provision of the other federal statute. Quite apart from the question of how we can know whether there is a violation of another federal statute until we have had a trial, the Norris-LaGuardia Act itself is categorical and has no such exception. The legislative history, of meagre assistance in some other questions pertaining to the Act, shows plainly that no such exception was intended and on the contrary was flatly rejected. And we have shown that the *Virginian* and *Tunstall* cases, the lone citations in support of such exception, fail to sustain the contention. An analysis of the *Virginian* case, whether from the point of view of whether it fell within the terms of the Act or from the point of view of whether the conditions of the Act were complied with in issuing the injunction, shows no exception to the plain provisions of the Act. In the *Tunstall* case this question was not pertinent, was not raised, and was not considered or decided. We urge that the greatest reluctance should be shown in grafting any exceptions on the Norris-LaGuardia Act, enacted after years of struggle and suffering and a recognition that only its categorical terms could offer protection. The enactment of that statute was a belated recognition of the fact, long urged and now universally accepted, that the injunctive processes of the courts are not appropriate instruments for the disposition of labor disputes.

B. In providing for the distribution of business among the federal courts, Congress took account of the convenience of defendants and provided that in the ordinary civil action cognizable in the federal courts and not founded on di-

versity of citizenship a defendant may be sued only in the district of which he is an inhabitant. Such provision is intended to serve the convenience of the defendant. It is plain that when the United States District Court for the District of Columbia entertains an action cognizable by it as a federal court it is governed by federal legislation and not by local legislation. The plain, simple language of the federal venue statute requires this suit to be dismissed as to respondent because brought in the wrong district. But various arguments requiring strained constructions and laborious theories are advanced in support of the proposition that respondent may be sued in the District of Columbia in this action. We have shown those arguments and theories to be unsound as a matter of law.

And no reason can be advanced why any effort should be made to avoid the plain impact of the federal venue statute in this case. Not only is respondent not an inhabitant of the District, but as the complaint shows not one of the twenty-one petitioners resides in the District of Columbia. None of the railroad defendants was a corporation of the District, and none of the local Brotherhood-affiliate defendants has any interest in the action. In this case, if any case, the plain provisions and obvious purpose of the federal venue statute should be applied with rigid vigor.

C. The District Court frankly stated that it regarded the defense of improper service as highly technical and one of which it disapproved and which it would seek to overrule if some plausible theory could be found to overrule it. After consideration the Court stated that its own view was that respondent had not properly been served but that it was holding to the contrary out of regard to the *Tunstall* decision in the Fourth Circuit. R. 59-60. We have shown that a crucial fact in the *Tunstall* case does not exist here (the representative character of the named defendants to represent the class), and that insofar as the *Tunstall* case permitted a class suit even with representative defendants it is squarely in conflict with the holding in the Second Cir-

cuit in the *Sperry Products* case. Those two cases are the only cases urged by counsel on either side to be squarely in point on the suability of the Brotherhood as a class (and hence whether it may be served other than as an unincorporated association). We have shown the better reasoning to be with the *Sperry Products* case, but even were it otherwise the facts here are different than in the *Tunstall* case in that representative defendants have not been named. The argument of petitioners that the Brotherhood as a suable entity was served in accordance with Rule 4(d)(3) is little short of frivolous.

D. The temporary injunction granted in the District Court would give petitioners most, and the heart, of the final relief claimed. It requires a radical change in long-established practices, and gives petitioners a status as employees they have not had heretofore. We have shown how well settled it is that a preliminary injunction may not be used to grant such relief. It should be observed that the situation of which petitioners complain is of long standing, existing on the Southern Railway for at least 39 years. Assuming that the suit was properly brought in the District of Columbia despite the federal venue statute, and assuming that the District Court had jurisdiction to grant injunctive relief despite the Norris-LaGuardia Act and had jurisdiction of respondent despite the lack of service, and assuming before trial that petitioners will prevail on the merits, we submit that until a trial on the merits establishes the right to the relief requested no such relief can properly be granted.

We believe that the trial on the merits, if one should be had in this case in the District of Columbia, will show the petitioners not to be entitled to the relief requested. But more important, we submit that prior to such trial and adjudication the relief sought as the object of the law suit should not be granted. We submit further that relief by injunction is beyond the jurisdiction of the District Court in this case. And finally, we submit that the District Court

cannot properly entertain the suit against the respondent because the respondent is not subject to suit in that Court in this cause and in any event has not properly been brought into that Court.

We have examined every contention of petitioners, and have shown each of them to be without merit. But the decision below should be affirmed if respondent is right in any of its arguments, for the respondent may not be enjoined by the District Court if the Norris-LaGuardia Act deprived the Court of jurisdiction to issue the injunction, if venue of the action does not lie in the District of Columbia, if the respondent has not been served with process and brought into that Court, or if the preliminary injunction was issued for a purpose not authorized by law. The existence of any of those situations, and all of them exist, vitiates the injunction and requires affirmance of the decision below.

Respectfully submitted,

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October 3, 1949.

APPENDIX.

28 U.S.C., Sec. 112. Federal venue statute.[16]

"* * * No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; * * *."

28 U.S.C., Sec. 1406, as amended by Pub. L. 72, 81st Cong., 1st Sess.; 63 Stat. 101. Cure or waiver of defects.[17]

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall *dismiss, or if it be in the interest of justice,* transfer such case to any district or division in which it could have been brought."

D. C. Code (1940 ed.), Sec. 11-306. General jurisdiction.

"Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

D. C. Code (1940 ed.), Sec. 11-308. Actions-Limitations Upon-Inhabitants or sojourners in District of Columbia.

"No action or suit shall be brought in the District Court of the United States for the District of Columbia by original process against any person who shall not be an inhabitant of, or found within, the District, except as otherwise specially provided."

[16] This statute was rephrased, since the decision of the District Court in this case and before the decision by the Court of Appeals, as 28 U.S.C., Sec. 1391(b). The Court of Appeals found that no substantive change was intended as a result of the rephrasing, and the petitioners agree with that conclusion. Pet. brief, p. 42.

[17] At the time of the decision below, the italicized words were not in the statute. They were added by amendment by the Act of May 24, 1949.

Constitution: Art. I, Sec. 8 (cl. 17):

"The Congress shall have power * * *
"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) * * *."

Constitution: Art. III, Sec. 1.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *."

Constitution: Art. III, Sec. 2.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *."

Rule 4(d)(3), Federal Rules of Civil Procedure. Summons: Service.

"* * * Service shall be made as follows:

* * * * *

"(3) Upon * * * unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

Rule 23(a), Federal Rules of Civil Procedure. Class Actions.

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce

that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Norris-LaGuardia Act (29 U.S.C., Secs. 101-15; Act of March 23, 1932, c. 90, 47 Stat. 70) (Section numbers indicated are sections in U. S. Code, Title 29).

"§ 101. Issuance of restraining orders and injunctions; limitation; public policy

"No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections."

"§ 102. Public policy in labor matters declared

"In the interpretation of sections 101-115 of this title and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in such sections, the public policy of the United States is declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor,

or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."

"§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in sections 101-115 of this title, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom

relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: * * *."

"§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

"§ 113. Definitions of terms and words used in chapter

"When used in sections 101-115 of this title, and for the purposes of such sections—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any

association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 452

LEROY GRAHAM, ET AL., PETITIONERS

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States submits that review by this Court is warranted in this case both by reason of the importance of the question of law determined by the court below, we think clearly erroneously, and because of the importance of the case itself.

This case is an attempt by Negro firemen to require the Brotherhood of Locomotive Firemen and Enginemen and the main Southern railroads to obey the ruling of this Court four years ago

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that it was unlawful for the Brotherhood, acting as representative for the craft of firemen, to enter into and enforce agreements discriminating against Negro members of the craft. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210. The complaint (R. 1) alleges that the Brotherhood and the railroads have combined to enforce the very agreement held unlawful in those cases (R. 14), and that as a result of the discrimination Negro firemen continue to be unlawfully displaced (R. 14). The temporary injunction granted by the District Court on December 3, 1947, against further discrimination *pendente lite* (R. 66–72) was vacated by the Court of Appeals on December 9, 1947 (R. 81–82), and the discrimination has continued for the ten and one-half months during which the question of venue was before the court below.

1. The case is important because it represents an effort by the Negro firemen to enforce the *Steele* and *Tunstall* rulings in a single lawsuit applicable throughout most of the South, instead of through a number of suits brought in different districts against various railroads and different locals of the Brotherhood. The Southern railroads probably cannot be sued in the Brotherhood's home district (Cleveland), and completely effective relief cannot be granted unless it is binding upon both the Brotherhood and the rail-

roads, the parties to the illegal agreement. And it has been suggested that the railroads are indispensable parties to suits involving the validity of the agreements.[1] It is apparently the tactics of the Brotherhood, in a case in which it obviously has no defense on the merits, either to force the suit to be brought in Cleveland, which is hardly an appropriate forum for a controversy involving practices on the Southern railroads under agreements made in the District of Columbia, and where there would be a question whether some possibly indispensable parties could be reached, or to force the Negro firemen into a protracted series of lawsuits throughout the South, which they would be required to wage with meagre financial and other resources[2] compared with those of the Brotherhood and the railroads. See the Appendix, *infra*, for the Brotherhood's attempts to defeat cases brought in other districts on similar grounds.

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[1] During the argument of the motion in the District Court, Judge Holtzoff stated (Tr. 142, not in printed record):

"* * * if the motion to quash the service is sustained then you will be in position to move to dismiss because of lack of an indispensable party, because in my opinion both the railroad and the Brotherhood are indispensable parties to the adjudication of the validity * * *"

[2] "4. The plaintiffs in this action and the other Negro firemen in whose behalf this suit has been brought are men of little means who are not financially or otherwise able to take necessary action to secure their rights under the law. This is especially true because the acts complained of have deprived these plaintiffs of the jobs or seniority rights upon which they depend for their livelihood" (R. 24).

We think it appropriate for this Court to take these considerations into account, and to grant certiorari in order to prevent this misuse of the processes of law[1] and the continued deliberate flouting of the law as established by this Court which the decision below permits.

2. The restrictive effect given by the court below to the District of Columbia venue statute also presents a question of importance. Although the issue affects only the District of Columbia, a rule which would result in discriminating against persons seeking to use the courts of the District, as compared with state courts, does present a question of sufficient importance for this Court to review. Cf. *National Mutual Insurance Company of the District of Columbia* v. *Tidewater Transfer Company, Incorporated,* No. 29, this Term.

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[1] The same affidavit prophetically states (R. 30–31):

"In all Court actions heretofore brought to enjoin the unlawful practices here complained of, the defendants have entered dilatory pleas and motions and have resisted all efforts to bring the issues to early determination. It is to be anticipated that similar moves will be made in this action. The passage of time necessary before there can be a final hearing and determination in this action will bring about the displacement or demotion of many of these plaintiffs and ultimate judgment in their favor will be a hollow victory. Such displaced firemen have no financial means of their own to support themselves and their families during the long period which would elapse between the date of their discharge and the ultimate judgment in this case."

The general federal venue statute (28 U. S. C. (1946 ed.) 112, now 28 U. S. C. 1391 (b)) required suit to be brought in the district of which the defendant was "an inhabitant." The District of Columbia venue statute permits suits to be brought against a defendant either "resident" of or "found within said district." District of Columbia Code, Section 11–306.

The decision below means that, although the District of Columbia courts combine the attributes of federal and state courts, in cases in which state courts would have concurrent jurisdiction with the federal the District of Columbia courts would not have jurisdiction at all unless the requisites of the general federal venue statute, rather than the District statute, were satisfied. To be more concrete, this means that an unincorporated association (or a corporation in the absence of a requirement of consent) doing business or found within the District but not having its main office or place of incorporation within the District cannot be sued within the District even though it could be under the same circumstances in any state.

The Court of Appeals assumed, *arguendo*, that the Brotherhood was "found" within the District of Columbia within the meaning of the local statute if that statute applied. We think that on the facts of the record the Brotherhood was so "found" within the District. Thus, the present

case clearly comes within the words of the District venue statute. And certainly nothing in the language of the general federal venue statute enacted mainly for the governance of the federal courts in the states, or of the two venue statutes read together, justifies a failure to apply the plain and unambiguous language of the former. It is significant that the court below does not rely on anything in the words, purpose or history of the local statute as a reason for disregarding its language.

The court seemingly rested its decision on the constitutional ground that a case over which the federal courts in the states as well as in the District would have jurisdiction under Article III of the Constitution cannot also fall within the jurisdiction of the District of Columbia courts under Article I and be controlled as to venue by legislation enacted under that Article. But since federal and state courts have concurrent jurisdiction over many cases, and Article I gives Congress the power of a state legislature over the courts of the District of Columbia, this is a complete *non sequitur*. Although Congress may legislate for the District of Columbia courts under both Article III and Article I, Section 8, Clause 17, of the Constitution, the coexistence of the two sources of power does not decrease the jurisdiction of the courts of the District of Columbia; on the contrary, it gives them the expanded jurisdiction

possessed by the federal and state courts combined. And obviously the two constitutional powers should be construed in harmony with and not in opposition to each other, so that the one will not limit the scope of the other. But the court below seems to have read the two Articles as if they were mutually exclusive.

The court below relied, we believe mistakenly, on a passage from this Court's opinion in *O'Donoghue* v. *United States*, 289 U. S. 516, 546,[4] written in connection with a problem of an entirely different sort. But only this Court is in a position to set the Court of Appeals straight as to the proper interpretation of the *O'Donoghue* opinion.

Outside of the District of Columbia, the cause of action stated in the present complaint falls within the area of concurrent jurisdiction of the

[4] "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere. The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable." 289 U. S. at 546.

state and federal courts, as the *Steele* and *Tunstall* cases conclusively demonstrate, the former coming from a state court and the latter from a federal court. Since the District of Columbia courts have the same authority as the state courts, it is clear that the court below erred in holding that the local venue statute, which is modeled on those of the states and which gives the District courts a venue similar to that of state courts, could not apply.

For the above reasons, we urge that the petition for a writ of certiorari be granted. We also suggest that if certiorari be granted, and if proper application be made by petitioners, this Court reinstate the injunction *pendente lite* granted by the District Court and vacated by the court below, in order to prevent further unlawful displacement of colored firemen while this protracted litigation runs its course.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

DECEMBER 1948.

APPENDIX

In *Rolax* v. *Atlantic Coast Line Railroad, Brotherhood of Locomotive Firemen and Enginemen, et al.*, Civil Action No. 670, E. D. Va., Richmond Division, filed April 12, 1947, the Brotherhood moved to dismiss on the grounds (1) that venue was lacking over it since it was not an inhabitant of the district, and (2) that the local lodges could not represent it for purposes of a class suit. The local lodges moved to dismiss on the ground that they were not representative of the Brotherhood. The motions were overruled by the district court in December 1947, and the case is scheduled for trial.

In *Hinton* v. *Seaboard Air Line R. Co., Brotherhood of Locomotive Firemen and Enginemen, et al.*, Civil Action No. 674, E. D. Va., Norfolk Division, the Brotherhood and the locals moved to dismiss on the same grounds as in the *Rolax* case, and the railroad moved to dismiss on the ground that there was no jurisdiction over the Brotherhood and the Brotherhood was an indispensable party. These motions were overruled by the district court on October 13, 1947.

In *Benjamin* v. *Louisville & Nashville R. Co., Brotherhood of Locomotive Firemen and Enginemen, et al.*, Civil Action No. 1285, W. D. Ky., Louisville Division, filed February 7, 1947, the Brotherhood and the railroad moved to dismiss (in a motion

and amended motion) on the same grounds as in the *Hinton* case. These motions have not yet been acted on by the district court.

In *Salvant* v. *Louisville & N. R. Co., Brotherhood of Locomotive Firemen and Enginemen, et al.*, Civil Action No. 1441, W. D. Ky., Louisville Division, filed February 21, 1948, the local lodges moved to dismiss on the ground that they did not represent the class composed of the lodges of the Brotherhood, the Brotherhood moved to dismiss for improper service of process, and the railroad moved to dismiss on the ground that the Brotherhood was an indispensable party and not suable within the district. On March 19, 1948, the Brotherhood's motion was granted and the other motions denied.

Even if these efforts to defeat all actions brought in any districts in which the Brotherhood and any of the Southern railroads can be reached jointly should ultimately be rejected by the appellate courts (compare *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 143 F. 2d 403 (C. C. A. 4) with the decision below), the defendants will have succeeded in delaying the granting of effective relief to the colored firemen for at least several years.

U. S. GOVERNMENT PRINTING OFFICE: 1948

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 16

LEROY GRAHAM, ET AL., PETITIONERS

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States is interested in this case both by reason of the importance of the question of law determined, we think erroneously, by the court below, and because of the importance of the case itself.

The case is an attempt by Negro firemen to require the Brotherhood of Locomotive Firemen and Enginemen and the main Southern railroads to obey the ruling of this Court four years ago that it was unlawful for the Brotherhood, acting as representative for the craft of firemen, to enter into

and enforce agreements discriminating against Negro members of the craft. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210. The complaint (R. 1) alleges that the Brotherhood and the railoads have combined to enforce the very agreement held unlawful in those cases (R. 14), and that as a result of the discrimination Negro firemen continue to be unlawfully displaced (R. 14). The temporary injunction granted by the District Court on December 3, 1947, against further discrimination *pendente lite* (R. 66-72) was stayed by the Court of Appeals on December 9, 1947 (R. 81-82). On October 26, 1948, on the ground of improper venue, the court ordered the case transferred to the Northern District of Ohio—which hardly seems to be an appropriate forum for a controversy involving the discrimination against employees on the Southern railroads under agreements made in the District of Columbia.

1. The general federal venue statute (28 U.S.C. (1946 ed.) 112, now 28 U.S.C. 1391 (b)) requires suit to be brought in the District of which the defendant is "an inhabitant." The District of Columbia venue statute permits suits to be brought against a defendant either "resident" of or "found within said district." District of Columbia Code, Section 11-306.

The Court of Appeals found that the Brotherhood was not "an inhabitant" of the District within the meaning of the general venue statute, but assumed, *arguendo*, that the Brotherhood was "found" within the District of Columbia within the meaning of the local statute if that statute applied. The court nevertheless held the local statute inapplicable, on the ground that "as applied to all cases which require the exercise by an inferior Federal court of the judicial power conferred by Article III, a general Federal venue statute is exclusive in its operation" (R. 77).

The present case clearly comes within the words of the District venue statute. And certainly nothing in the language of the general federal venue statute enacted mainly for the governance of the federal courts in the states, or of the two venue statutes read together, justifies a failure to apply the plain and unambiguous language of the former. It is significant that the court below does not rely on anything in the words, purpose or history of the local statute as a reason for disregarding its language.

The court seemingly rested its decision on the constitutional ground that a case over which the federal courts in the states as well as in the District would have jurisdiction under Article III of the Constitution cannot also fall within the jurisdiction of the District of Columbia courts under Article I

and be controlled as to venue by legislation enacted under that Article. But since federal and state courts have concurrent jurisdiction over many cases, and Article I gives Congress the power of a state legislature over the courts of the District of Columbia, this is a complete *non sequitur*. Although Congress may legislate for the District of Columbia courts under both Article III and Article I, Section 8, Clause 17, of the Constitution, the coexistence of the two sources of power does not decrease the jurisdiction of the courts of the District of Columbia; on the contrary, it gives them the expanded jurisdiction possessed by the federal and state courts combined. And obviously the two constitutional powers should be construed in harmony with and not in opposition to each other, so that the one will not limit the scope of the other. But the court below seems to have read the two Articles as if they were mutually exclusive.

The decision below means that, although the District of Columbia courts combine the attributes of federal and state courts, in cases in which state courts would have concurrent jurisdiction with the federal the District of Columbia courts would not have jurisdiction at all unless the requisites of the general federal venue statute, rather than the District statute, were satisfied. To be more concrete, this means that an unincorporated association (or a corporation in the absence of a requirement of consent) doing business or found within the District

but not having its main office or place of incorporation within the District cannot be sued within the District even though it could be under the same circumstances in any state.

The court below relied, we believe mistakenly, on a passage from this Court's opinion in *O'Donoghue v. United States*, 289 U. S. 516, 546,[1] written in connection with a problem of an entirely different sort. A mere reading of the language in question will demonstrate its irrelevance here.

Outside of the District of Columbia, the cause of action stated in the present complaint falls within the area of concurrent jurisdiction of the state and federal courts, as the *Steele* and *Tunstall* cases conclusively demonstrate, the former coming from a state court and the latter from a federal court. Since the District of Columbia courts have the same authority as the state courts, it is clear that the

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[1] "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere. The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable." 289 U. S. at 546.

court below erred in holding that the local venue statute, which is modeled on those of the states and which gives the District courts a venue similar to that of state courts, could not apply.

2. If this Court reverses the court below on the question of venue, it will have a choice as to whether to dispose of the other issues in the case itself or to remand them to the lower court. Although the latter course is often followed, it is clearly in the public interest for the Court in this case to see that the propriety of the temporary injunction is determined without further delay.

The *Tunstall* and *Steele* cases were decided by this Court in 1944. This case was commenced in October 1947. The temporary injunction against continued discriminatory firing of colored employees will, by the time this case is decided by this Court, have been stayed by the court below for almost two years. During all that time respondent has disregarded the ruling of this Court, even after its reinforcement by a final decision on the merits in the *Tunstall* case by the Court of Appeals for the Fourth Circuit. 163 F. 2d 289, certiorari denied, 332 U. S. 841. The colored firemen have continued to lose their jobs. Clearly, in these circumstances justice delayed will be justice denied.

The other questions are whether the respondent was properly served, whether the Norris-LaGuardia Act precludes the issuance of an injunc-

tion in this type of case under the Railway Labor Act, and whether the lower court abused its discretion in granting a temporary injunction. Respondent has indicated [2] that it will urge these alternative grounds in support of the judgment in its favor, as it has the right to do. The points are not difficult or complicated, and can readily be disposed of on the record now before the Court. If they are not, further proceedings in the Court of Appeals will be necessary, with the possibility of further review here—proceedings which the past progress of this case indicates may well take a long time. And even if petitioners should ultimately prevail in all respects on these points, they will only have obtained a temporary injunction. There will still have to be a trial on the merits.

These questions are fully argued in petitioners' brief, with which we agree, and need not be reargued in this brief. Respondent's contentions as to these points seem no more substantial than those relating to venue.

We wish to emphasize, however, the need for the interlocutory relief accorded petitioners by the District Court. In view of this Court's decisions as to the unlawfulness of the very contract here in issue, and the obvious injury to the colored workers if interlocutory protection is not accorded them, it would have been an abuse of discretion for the

[2] See brief in opposition, p. 4n.

temporary injunction to have been denied. It was thus clear error for the Court of Appeals to vacate the injunction by granting a stay.[3]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ROBERT L. STERN,
Special Assistant to the Attorney General.

SEPTEMBER, 1949.

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[3] Even if the Court of Appeals' decision on the question of venue should be affirmed, it does not follow that the temporary injunction should be immediately vacated, for the Court of Appeals did not order the case dismissed but transferred it to the Northern District of Ohio pursuant to 28 U.S.C. § 1406(a). Inasmuch as the plaintiffs are in need of interlocutory protection against further discriminatory discharges, the temporary injunction granted by the District Court for the District of Columbia should remain in effect until such time as the matter can be submitted to the Ohio court. In view of the newness of the statutory provision for transfer, the point is a novel one. But the answer which the public interest requires seems clear if persons are not to be irreparably harmed as a result of having, reasonably and in good faith, chosen what may turn out to be the wrong venue.

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IN THE

Supreme Court of the United States

~~OCTOBER TERM, 1948—No. 452~~

OCTOBER TERM, 1949—No. 16

LEROY GRAHAM, *Et Al.*,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

BRIEF OF *AMICUS CURIAE*

JAMES B. McDONOUGH, JR.,
FRANK J. WIDEMAN,
Counsel for Seaboard Air Line Railroad Company, as Amicus Curiae.

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LEROY GRAHAM, *Et Al.*,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement.

The undersigned, as counsel for Seaboard Air Line Railroad Company (hereinafter called Seaboard) respectfully submit the following brief *amicus curiae*. The written consent required by paragraph 9 of Rule 27 of the rules of this Court has heretofore been filed with the Clerk.

The Seaboard is a party to the instant "case", although it was not a party to the appeal to the court below and it is not a party before this Court. Four Negro locomotive

firemen employed by it are named in the complaint as parties plaintiff (Graham (R. 9), Munlin (R. 9), Sullivan (R. 10), and Hogan (R. 11)) it is named in the complaint as a party defendant (R. 2, 73), and counsel *amicus curiae* appeared for it before the District Court for the purpose of a motion to dismiss or stay the proceedings (R. 47).

Upon that motion, by reason of the pendency of another action, the District Court in this case entered its order dated November 17, 1947, staying this action, "as against defendant, Seaboard Air Line Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by defendant Seaboard Air Line Railroad Company", and by the same order denied as to those same defendants the plaintiffs' motion for a preliminary injunction. That order is set out in full in the Appendix hereto.

The prior action was the case of *Hinton* v. *Seaboard Air Line Railroad Company, et al.*, No. 674, then and now, pending in the District Court of the United States for the Eastern District of Virginia. The plaintiff, Hinton, was and is a Negro locomotive fireman employed by the Seaboard, and the action was brought in his individual capacity and "as a representative of all the Negro locomotive firemen employed by the Seaboard". His complaint, a copy of which was before the District Court and is part of the proceedings in this case, attacks the same agreement of February 18, 1941, against which the instant complaint is directed (R. 6, 7, 8 and 15).

As the District Court pointed out, at the time of its stay order of November 17, 1947, all questions of service in the *Hinton* case had been passed (R. 62) although, as a matter of fact, no injunctive relief had at that time been granted.

The plaintiff in the *Hinton* case, however, promptly made a motion for a temporary injunction which was granted the following month, by order of the District Court for the Eastern District of Virginia dated December 30, 1947. It was necessary to instruct and qualify the Negro locomotive firemen in order for them to serve on Diesel locomotives, a necessity recognized by the injunction order, but qualified Negro locomotive firemen employed by the Seaboard began to serve on Diesel locomotives shortly after the temporary injunction of December 30, 1947, and they are so serving at the present time. No appeal was taken from the order granting that temporary injunction by any party to the *Hinton* case and it has remained and is in full force and effect and its provisions are being obeyed.

The *Hinton* case is mentioned in the appendix to the Memorandum for the United States as *Amicus Curiae*, filed in this Court, but even though that Memorandum is dated December, 1948, it makes no mention of the injunctive relief granted a year previously in the *Hinton* case. Counsel *amicus curiae* respectfully submit that there has been no "misuse of the processes of the law" where counsel for the plaintiffs have proceeded by an appropriate form of action in an appropriate forum. Counsel also respectfully submit that the instant proceeding is not an appropriate form of action and that it has been brought in a wrong and inappropriate forum.

Argument.

It is the position of counsel *amicus curiae* that the question of venue now before this Court cannot be properly evaluated and determined until the character of the instant proceeding is carefully considered.

The several class actions brought on behalf of Negro locomotive firemen pursuant to Rule 23 of the Federal Rules of Civil Procedure, and pending in a number of different courts, have tended to produce confusion of thought because of a failure to keep firmly in mind certain operative and essential distinctions. Those distinctions are with respect to the class on behalf of which the actions have been brought and with respect to the functioning of the Brotherhood of Locomotive Firemen and Enginemen.

All of the Negro locomotive firemen in the United States constitute a "class", simply because they are Negroes and are employed as locomotive firemen. Not all the members of that class are similarly situated, however, as a member of that class employed by a railroad that did not have a discriminatory agreement would have no cause for complaint.

There could be a class of Negro locomotive firemen employed by railroads that had discriminatory agreements. That class might, or might not, embrace only the Negro locomotive firemen employed by the twenty-one railroads listed in Exhibit A to the complaint (R. 17), as there may be other railroads that have discriminatory agreements.

There could be a class of Negro locomotive firemen employed by the twenty-one railroads listed in Exhibit A to the complaint as parties to the so-called Washington Agreement of February 18, 1941. That class, however, would be similarly situated only with respect to the matters set forth in that agreement. That agreement does not by any means constitute the entire agreement with respect to the rates of pay, rules and working conditions, of locomotive firemen. The entire agreement is in each case a separate agreement with each railroad. The Agreement of February 18, 1941, was no more than an agreement to amend

each of the separate and several agreements with the individual carriers in the respects therein set forth, and paragraph (7) should make that sufficiently clear (R. 19).

The only class of Negro locomotive firemen in which the members are similarly situated is the class employed by one railroad and subject to the agreement negotiated with that railroad. In other words, for the purposes of Rule 23(a) there are as many classes of Negro locomotive firemen as there are individual railroads having agreements negotiated under the Railway Labor Act respecting the rates of pay, rules and working conditions of locomotive firemen.

The Brotherhood of Locomotive Firemen and Enginemen functions in a dual or double capacity. The Court of Appeals for the Fourth Judicial Circuit had that fact clearly in mind in writing the opinion in the case of *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. 2d 403 (April 9, 1945). In one capacity the Brotherhood of Locomotive Firemen and Enginemen is "the unincorporated association in its common name as an entity". In its other capacity it is the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by an individual railroad, in which capacity it has a multiple personality.

Counsel *amicus curiae* respectfully submit that the instant proceeding is nothing more than an attempt to join in one complaint three separate and distinct class actions which are:

> 1. The class of Negro locomotive firemen employed by the Seaboard against the Seaboard and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of all locomotive firemen employed by the Seaboard (hereinafter called the Seaboard Brotherhood).

2. The class of Negro locomotive firemen employed by the Atlantic Coast Line Railroad Company (hereinafter called the Coast Line) against the Coast Line and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of all locomotive firemen employed by the Coast Line (hereinafter called the Coast Line Brotherhood).

3. The class of Negro locomotive firemen employed by the Southern Railway Company, disregarding but considered as including its subsidiaries (hereinafter called the Southern) against the Southern and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of all locomotive firemen employed by the Southern (hereinafter called the Southern Brotherhood).

If and when such an action is brought in or transferred to an appropriate forum the question of whether such consolidation is proper can be considered. It may or may not be appropriate to try all three actions at one time. Each of the defendants will set up the separate agreements of which there are three (i.e. one between the Seaboard and the Seaboard Brotherhood, another between the Coast Line and the Coast Line Brotherhood, and still another between the Southern and the Southern Brotherhood), and of which, in each case, the provisions of the jointly negotiated agreement of February 18, 1941, constitute but a part.

It may well be that the convenience of the parties and the furtherance of justice will not be served by such a consolidation. In any event, it is respectfully submitted that there is no foundation in fact for the statement in the Memorandum for the United States as *Amicus Curiae* that this case is important "because it represents an effort by

the Negro firemen to enforce the *Steele* and *Tunstall* rulings in a single lawsuit applicable throughout most of the South, instead of through a number of suits brought in different districts against various railroads and different locals of the Brotherhood". If, as a matter of fact, consolidation is desirable, there is no reason or necessity for bringing different suits in different jurisdictions, and no importance whatever need be attached to the fact that this is a "single lawsuit".

The instant suit, for example, could just as well have been brought, by the one complaint, filed in the District Court for the Eastern District of Virginia, at Alexandria. If the plaintiffs and their counsel are assiduous to protect and preserve the rights of the respective classes of Negro locomotive firemen, why have they spent nearly two years in the effort to maintain this action in the District of Columbia when it could have been brought at any time in a convenient forum in which all questions of service, venue, and jurisdiction have been set at rest (*Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. 2d 403 (C. C. A. 4th, April 9, 1945), and *Brotherhood of Locomotive Firemen and Enginemen* v. *Tunstall*, 163 F. 2d 289 (C. C. A. 4th, August 20, 1947, with certiorari denied by this Court on December 15, 1947)) unless, of course, this Court should affirm the court below in directing that "the case" be transferred to the Northern District of Ohio.

If the Brotherhood, as the defendant in these Negro firemen cases, is, in each case, the unincorporated association in its common name as an entity, and can only be sued in Cleveland, and is not, as the case may be, the Seaboard Brotherhood, or the Coast Line Brotherhood, or the Southern Brotherhood, or the Norfolk Southern Brotherhood (the defendant in the *Tunstall* case), and suable as such wherever

adequately represented, then the *Tunstall* case was erroneously decided and all such pending cases, including the *Hinton* case, must fail. Such is obviously not the situation.

The court below correctly analyzed the *Tunstall* decision in 148 F. 2d 403, but it failed to carry forward and apply that analysis in its ultimate conclusion. It may be that the very fact of the consolidated form of the action caused confusion. In the instant case the Coast Line made the same motion for a stay as was made by the Seaboard, based upon the pendency of the *Rolax* case (referred to in the Memorandum for the United States as *Amicus Curiae*) which was also pending in the Eastern District of Virginia. That motion was denied by the District Court for the reason that in the *Rolax* case a motion to quash the service was still pending (R. 61, 62).

Suppose the Coast Line's motion had been granted. The order upon the Seaboard's motion removed the Seaboard and the Seaboard Brotherhood from the case. The order upon the Coast Line's motion would have removed the Coast Line and the Coast Line Brotherhood from the case, and there would have been left as defendants only the Southern and the Southern Brotherhood. It should be apparent, without more, that the Brotherhood, *qua* Brotherhood, "the unincorporated association in its common name as an entity" was not, in fact, a defendant at all. If it had been, any injunction granted against it as such, enjoining the carrying out of the Agreement of February 18, 1941, would necessarily have been as effective as to the Seaboard as it was with respect to the Coast Line and the Southern. Any such result would, of course, have had the effect of overruling the order of November 17, 1947 (see the Appendix hereto), and the form of the injunction granted by the order of December 3, 1947, negatived any such result (R. 66-72).

Conclusion.

1. The court below was correct in holding, even though it was an academic matter to do so, that the inhabitancy of the Brotherhood, *qua* Brotherhood, was in Cleveland, Ohio and that, under the Federal venue statute (at the time of the hearing before the District Court, Title 28, U. S. C. Sec. 112; at the time of the decision by the court below, Title 28, U. S. C. Sec. 1391 (b)) a suit against the Brotherhood, *qua* Brotherhood, could not be maintained, under that statute, in the District of Columbia.

2. The court below was correct in holding that the Federal venue statute governed to the exclusion of the local venue statute (D. C. Code (1940), Sec. 11-308).

3. If this Court should not concur that the Federal venue statute governed to the exclusion of the local venue statute, the local venue statute, nevertheless, does not authorize the action to be maintained in the District of Columbia, for the following reasons:

a) The presence of a legislative representative or other members of the Brotherhood within the District of Columbia may cause the Brotherhood, *qua* Brotherhood, to be "found" within the District for the purposes of the local venue statute, in some cause of action based upon something other than its functioning as the representative of locomotive firemen, but the Brotherhood, *qua* Brotherhood, and apart from such representation, was not and could not have been (for the reasons above set forth) a defendant to this action.

b) No members, or representatives, of the Seaboard Brotherhood, the Coast Line Brotherhood, or the Southern Brotherhood, are "found" within

the District, within the meaning of the local venue statute.

4. The court below erred in directing the District Court to transfer "the case" to the Northern District of Ohio. To the extent that that was a holding that under the Federal venue statute the Brotherhood could only be sued in Ohio, the court below was also in error. In addition, Section 1406(a), Title 28, U. S. C. only authorizes the transfer of a case to a district or division "in which it could have been brought." There is nothing in the record to show that the case could have been brought in that district. Such a transfer could be ordered only if the record showed that service could be had upon the railroad defendants in that district, or if the railroad defendants were not parties to the case, which they still are.

5. The court below should have directed the District Court to transfer the case to an appropriate district, leaving to the District Court the determination, upon the facts presented and to be presented to that court, as to what would be an appropriate court where the action could have been brought. If, however, upon this record, it is proper for this Court or the court below to give directions in that regard, the District Court should be directed to transfer the case to the Eastern District of Virginia.

Respectfully submitted,

JAMES B. McDONOUGH, JR.,
FRANK J. WIDEMAN,
Counsel for Seaboard Air Line Railroad Company, as *Amicus Curiae*.

Dated October 8, 1949.

APPENDIX.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA.

LEROY GRAHAM, *et al.*,
On behalf of themselves and all others similarly situated,
Plaintiffs,

v.

SOUTHERN RAILWAY COMPANY, *et al.*,
Defendants.

Civil Action
No. 4330-47

ORDER (A) GRANTING STAY OF PROCEEDINGS HEREIN AS TO SEABOARD AIR LINE RAILROAD COMPANY AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AS THE REPRESENTATIVE OF LOCOMOTIVE FIREMEN EMPLOYED BY SEABOARD AIR LINE RAILROAD COMPANY, AND (B) DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AS TO SEABOARD AIR LINE RAILROAD COMPANY AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AS THE REPRESENTATIVE OF LOCOMOTIVE FIREMEN EMPLOYED BY SEABOARD AIR LINE RAILROAD COMPANY.

This cause came on to be heard on the 10th day of November, 1947, upon the complaint and

Upon the affidavits of W. R. C. Cocke and James S. Riggan, by them verified October 31, 1947, and upon the motion of defendant, Seaboard Air Line Railroad Company, dated October 31, 1947, for an order (a) dismissing the

complaint (i) as to the plaintiffs: John W. Warran, Robert Murray, William Pratt, Luther Thomas, Ernest Duckett, John Cotton, Spencer Hicks, Moses Maxwell, A. A. Fields, Edward Jackson, C. B. Battle, M. C. Davis, Lonnie Gorham, James Johnson, Walter Thomas, Thomas Edwards, Sr., and George W. Zimmerman, on the ground that as to such plaintiffs the complaint failed to state a claim against defendant, Seaboard Air Line Railroad Company, upon which relief could be granted and (ii) as to the plaintiffs: LeRoy Graham, Joseph Munlin, Ed Sullivan and Sam Hogan, on the ground that there is another class action for the same cause brought on their behalf as locomotive firemen employed by defendant Seaboard Air Line Railroad Company, pending in the District Court of the United States for the Eastern District of Virginia, against defendant, Seaboard Air Line Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by defendant, Seaboard Air Line Railroad Company, or (b) in the alternative for an order in this cause staying all further proceedings herein against defendant, Seaboard Air Line Railroad Company during the pendency of the class action pending in the District Court of the United States for the Eastern District of Virginia, above mentioned;

Upon the affidavit of Benjamin F. McLaurin verified October 25, 1947, and upon the motion of plaintiffs dated October 27, 1947, for a preliminary injunction against the defendants Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 7 "Potomac"—Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 532 "National Capitol"—Brotherhood of Locomotive Firemen and Enginemen, Marven M. McQuade and William E. Lacey (and as to the corporation defendants and the Brotherhood of Locomotive Firemen and Enginemen and its subordinate lodges above named, their officers, agents, servants, employees and

attorneys) (a) restraining said defendants, and all of them, from recognizing or enforcing or complying with the agreement of February 18, 1941 (Exhibit A to the complaint); (b) ordering and directing the defendant railroads to cause the other railroads and terminal companies mentioned in Paragraphs 13, 14 and 15 of the complaint to cease and desist from recognizing or enforcing the said agreement dated February 18, 1941, and (c) enjoining the defendant Brotherhood of Locomotive Firemen and Enginemen from purporting to act as plaintiffs' representative or as the representative of the class or craft of locomotive firemen so long as it should not represent or act fairly on behalf of all locomotive firemen;

And it appearing to the Court that there is pending in the District Court of the United States for the Eastern District of Virginia a class action (Civil Action No. 674) in which the plaintiff, David H. Hinton, alleges that he is a locomotive fireman employed by defendant, Seaboard Air Line Railroad Company, and that he brings the action in his individual capacity and as a representative of all negro locomotive firemen employed by Seaboard Air Line Railroad Company and in which the defendants are said Seaboard Air Line Railroad Company (a defendant herein), Brotherhood of Locomotive Firemen and Enginemen (a defendant herein), Ocean Lodge No. 76—Brotherhood of Locomotive Firemen and Enginemen, Devotion Lodge No. 402—Brotherhood of Locomotive Firemen and Enginemen, Port Norfolk Lodge No. 775—Brotherhood of Locomotive Firemen and Enginemen, and in which it is alleged that the Brotherhood of Locomotive Firemen and Enginemen, the defendant therein, is the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by the Seaboard Air Line Railroad Company, and that it is sued as such representative, and in which it is alleged that the Southeastern Carriers' Conference Agreement, dated February 18, 1941, upon which the complaint herein is predicated, is unlawful and in which injunctive

relief is prayed; and the Court having heard argument of counsel and being advised in the premises

It is Ordered that this action be, and the same hereby is, stayed as against defendant, Seaboard Air Line Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of firemen employed by defendant, Seaboard Air Line Railroad Company, and that the plaintiffs and their attorneys herein be, and they hereby are, stayed from taking any further action in this cause against said defendant Seaboard Air Line Railroad Company and against the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by defendant Seaboard Air Line Railroad Company, until entry of final judgment in the above mentioned case of *Hinton* v. *Seaboard Air Line Railroad Company, et al.*, No. 674, pending in the District Court of the United States for the Eastern District of Virginia; and

It is Further Ordered that with respect to the defendant Seaboard Air Line Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by defendant Seaboard Air Line Railroad Company the motion of the plaintiffs for a preliminary injunction be, and the same hereby is, denied.

(sgd.) Alexander Holtzoff
Justice
District Court of the United States
for the District of Columbia.

Dated November 17, 1947.